Sabah Shell Petroleum Co Ltd & Anor v The Owners of and/or Any Other Persons Interested in the Ship or Vessel the 'Borcos Takdir'

HIGH COURT (KUALA LUMPUR) — ADMIRALTY ACTION IN REM NO D3–27–18 OF 2006
NALLINI PATHMANATHAN J
4 JULY 2012

Evidence — Hearsay — Documentary hearsay — Reliance on hearsay to establish facts — Effect of

Evidence — Hearsay — Oral hearsay — Reliance on hearsay to establish facts — Effect of

Evidence — Witness — Failure to call master of ship — Whether proper case for court to draw adverse inference against defendant — Evidence Act 1950 s 114(g)

Tort — Negligence — Duty of care — Defendant's vessel ruptured and damaged plaintiff's pipeline — Whether defendant owed plaintiffs duty of care — Whether rupture of pipeline amounted to breach of duty of care — Whether damage sustained as consequence of breach — Doctrine of res ipsa loquitur — Conditions — Whether satisfied — Whether doctrine applicable to present case — Contributory negligence — Whether proven — Quantum — Whether plaintiffs' claim limited to RM5m by virtue of contractual limitation clause in contract — Whether defendant entitled to limitation of liability under s 360 of the Merchant Shipping Ordinance 1952

The plaintiffs were at all material times engaged in offshore oil and gas exploration and production activities ('offshore activities') in the offshore areas of Sabah and Sarawak. For the purpose of their offshore activities, the plaintiffs operated offshore platform structures, which consisted of various connecting pipes including a 6 inch underwater oil pipeline ('the pipeline'). By way of a contract dated 14 October 2002 ('the contract') the plaintiffs had deployed the defendant's vessel the Borcos Takdir ('the vessel') to deliver such cargoes for food, equipment, tools and machinery to the plaintiffs' offshore platform structures. On 28 July 2004, the vessel had damaged the pipeline. It was the plaintiffs' case that the anchor dropped from the vessel had snagged and snagged the pipeline causing the same to rupture and that such an incident ought not to have happened at all in the ordinary course of good seamanship.

The plaintiffs thus commenced the present action against the defendant for the substantial loss and damage they had suffered as a consequence of the defendant's negligence and/or breach of duty or breach of contract in the navigation, management, operation and use of the vessel. The plaintiffs attributed the cause of the incident to the failure of the master of the vessel ('the master') to plot his anchor drop position, which placed the fault element entirely on the defendant. The plaintiff also contended that since the facts of the incident speak for itself this was a fit and proper case to invoke the doctrine of *res ipsa loquitur*. On the issue of liability the defendant maintained that the act complained of and the resultant damage was actually caused by or contributed to by the plaintiffs' own conduct. In rebutting the claim of negligence, the defendant submitted that the incident was caused primarily by the plaintiff failing to provide adequate admiralty charts and maps and secondly in the offshore installation manager at the oil rig ('OIM') instructing the vessel to drop anchor. According to the defendant, the first omission resulted in the master making an error in the course of carrying out the technique of parallel indexing, a method utilised to determine where to place the anchor, and the second act on the part of the OIM was alleged to have compounded the first error. On the issue of quantum the defendant maintained that the plaintiffs' claim was limited to RM5m by virtue of cl 21(1)(b), a contractual limitation clause in the contract. Alternatively the defendant pleaded the defence of limitation of liability under s 360 of the Merchant Shipping Ordinance 1952. In response the plaintiffs submitted that they had provided the defendant with updated topographical charts and that the dropping and retrieval of the anchor was solely the responsibility of the defendant, its servants or agents.

Held, allowing the plaintiffs' claim for the sum of RM33,214,656.64 and USD3,804,611.71 together with interest and costs:

(1) To ascertain whether the evidential rule of *res ipsa loquitur* was applicable on the factual matrix of the present case, it had to be determined whether the three conditions required to be satisfied had been met. When a ship dropped anchor in the vicinity of an oil field with sub-sea pipelines it was not expected to damage or rupture pipelines. As such, the first requirement that the incident would not have happened without negligence was satisfied. Since the master of the vessel exercised full authority on all matters relating to the management and navigation of the vessel whilst in operation the second requirement was also met. The third condition, namely that there was no evidence as to how or why the occurrence took place, was also satisfied. From the evidence adduced this court was constrained to conclude that despite several investigation reports being lodged in respect of this incident, there was no evidence before this court to enable it to determine with precision how or why the incident took place. This was because the master did not testify and no

direct account of the events prior to anchor drop by the master or the crew was available at trial save for the reports, which equally amounted to documentary hearsay. As such, the present case was a suitable one for the application of the doctrine of *res ipsa loquitur* (see paras 42–44 & 50).

(2) It was clear from the terms of the contract between the parties that the master of the vessel was accepted to strictly adhere to accepted practices when determining when to drop anchor in an oil field with sub-sea oil and gas pipes. As such there was a duty of care owed by the defendant to the plaintiffs. As the vessel was entirely under the control and care of the master and in the absence of a reasonable explanation, the snagging and rupture of the pipeline amounted to breach of the duty of care owed by the defendant to the plaintiffs. As a consequence of the breach of that duty of care, damage was sustained thereby completing the test for negligence. Thus the elements sufficient to found a prima facie basis for negligence stood established by the plaintiffs (see paras 55(a) & 56).

(3) The issue as to whether the master of the vessel undertook the parallel indexing method and whether he carried it out correctly was in issue but the master of the vessel was not called to testify. In effect the defendant relied primarily on the hearsay evidence of one its witnesses to establish as a matter of fact that the incident was cause by the master making a mistake in performing the technique of parallel indexing and determining where to drop anchor. In view of the absence of evidence on the crucial issue of what the master did, it followed that the defendant had failed to rebut or discharge the inference of negligence established prima facie by the plaintiffs (see paras 71–72 & 90).

(4) The person best placed to explain fully the events of the day would have been the master but the defendant failed to call the master as witness, stating that he was unco-operative. Given the importance of this witness' evidence, the defendant's failure to subpoena him led this court to conclude that the master's evidence if produced, would affect the defendant adversely. This was a fit and proper case for this court to draw an adverse inference under s 114(g) against the defendant (see para 92).

(5) Having considered the competing testimonies of the witnesses at trial, it appeared to the court that the plaintiffs had in fact produced a topographical chart showing the presence of the oil and gas pipelines clearly. In any case, a supply boat navigating in the oilfield was bound to be aware of the existence of oil pipelines when carrying out its duties. Thus, the plaintiffs' failure to provide adequate admiralty charts and maps did not amount to a breach which gave rise to or contributed to the cause of the rupture of the pipeline (see para 97).

(6) Further the radio operators such as the OIM were not to instruct the master to drop anchor and the responsibility of navigating the vessel

including the dropping of anchor could not be delegated to the OIM. Thus, the decision of precisely where to drop the anchor lay with the master. As such, the defendant's submission that the OIM instructing the vessel to drop anchor resulted in the master making an error was rejected. Thus there was no basis to support a finding of contributory negligence against the plaintiffs (see paras 104 & 106).

(7) This court was satisfied that cl 21(1) of the contract in its entirety did not provide a contractual limitation as was submitted by the defendant but instead operated as an indemnity clause providing for cover in two tranches as it were; the first tranche was the sum of RM5m which was payable by the defendant notwithstanding that fault or liability was not attributed entirely to it, so long as the incident in question was not caused by the sole negligence of the plaintiffs; and, the second tranche only arose when there was liability which had been determined and adjudicated upon in accordance with the law. Therefore, there was no contractual limitation of RM5m in respect of all the physical loss suffered by the plaintiffs, as alleged by the defendant (see paras 133–134).

(8) In order for the defendant to be entitled to a limitation of liability under s 360 of the Ordinance the defendant had to establish that the incident occurred without its actual fault or privity. The law was clear however that neither the employment of a competent master nor a manager would divest a ship owner of certain aspects of its responsibility. On the evidence it appeared to this court that this was a case where the defendant simply shut their eyes to the obvious risk of a casualty arising from a defective anchor operation in the vicinity of an oil pipeline (see paras 137, 154 & 188).

(9) The evidence at trial disclosed that the plaintiffs had expended a total sum of RM34,548,477.64 and USD4,860,440.71 and that at the time of the proposed repair of the damages pipeline and other structural damage it had to manage two competing projects, which needed attention. In the opinion of the court, the plaintiffs had acted reasonably in according priority to one of these two projects. On the evidence there was also no real dispute that the sums claimed by the plaintiffs were in fact accrued and paid out by it. This court was also satisfied that the plaintiffs were at pains to procure and negotiate reasonable contracts and rates. However, based on the circumstances, the court allowed a 30% deduction for mobilisation and demobilisation costs and a 30% deduction in respect of weather downtime costs from the plaintiff's total claim of RM34,548,477.64 and USD4,860,440.71 (see paras 201, 213(c) & 213(f)).

[Bahasa Malaysia summary

Plaintif-plaintif pada setiap masa matan dilantik dalam pengembaraan minyak dan gas di luar pesisir dan aktiviti-aktiviti penghasilan ('aktiviti luar pesisir') di

kawasan-kawasan luar pesisir Sabah dan Sarawak. Bagi tujuan aktiviti luar pesisir mereka, plaintif-plaintif menjalankan struktur lantai luar pesisir, yang mengandungi pelbagai sambungan paip termasuklah salur paip minyak dalam air 6 inci ('salur paip'). Melalui kontrak bertarikh 14 Oktober 2002 ('kontrak') plaintif-plaintif telah mengatur kedudukan kapal defendan Borcos Takdir ('kapal') untuk menghantar muatan untuk makanan, pelengkapan, peralatan dan mesin kepada struktur lantai luar pesisir plaintif-plaintif. Pada 28 Julai 2004, kapal tersebut telah merosakkan salur paip itu. Adalah kes plaintif-plaintif bahawa sauh yang jatuh daripada kapal tersebut tersangkut dan menyentap salur paip itu menyebabkannya salur paip itu pecah dan bahawa kejadian sedemikian tidak patut berlaku langsung dalam pelaksanaan biasa kepelautan yang baik. Plaintif-plaintif dengan itu telah memulakan tindakan ini terhadap defendan untuk kerugian dan kerosakan besar yang dialami oleh mereka akibat daripada kecuaian defendan dan/atau pelanggaran kewajipan atau pelanggaran kontrak dalam pengemudian, pengurusan, pelaksanaan dan penggunaan kapal tersebut. Plaintif-plaintif mengatakan sebab kejadian tersebut adalah kerana kegagalan ketua kapal tersebut ('ketua kapal') untuk merancang kedudukan jatuh sauhnya, yang meletakkan elemen kebersalahan keseluruhannya ke atas defendan. Plaintif juga berhujah bahawa oleh kerana fakta kejadian jelas dan nyata dengan sendirinya maka ini adalah kes yang sesuai dan wajar untuk menggunakan doktrin *res ipsa loquitor*. Berhubung isu liabiliti defendan menegaskan bahawa tindakan mengadu dan akibat kerosakan itu sebenarnya disebabkan oleh atau disumbangkan oleh perbuatan plaintif-plaintif sendiri. Dalam mematahkan tuntutan untuk kecuaian, defendan berhujah bahawa kejadian itu disebabkan terutamanya oleh plaintif kerana gagal memberikan carta dan peta admiralti yang cukup dan keduanya, pengurus pemasangan luar pesisir di pelantar minyak ('PPLP') mengarah kapal tersebut melabuhkan sauh. Menurut defendan, peninggalan pertama menyebabkan ketua kapal membuat kesilapan dalam menjalankan teknik indeks selari, iaitu cara yang digunakan untuk menentukan tempat di mana untuk melabuhkan sauh, dan tindakan kedua di pihak PPLP dikatakan telah memburukkan lagi kesilapan pertama. Berhubung isu kuantum defendan menegaskan bahawa tuntutan plaintif-plaintif terhad kepada RM5 juta menurut fasal 21(1)(b), iaitu fasal had masa kontraktual dalam kontrak itu. Sebagai alternatif defendan memplid pembelaan had masa liabiliti di bawah s 360 Ordinan Perkapalan Saudagar 1952. Sebagai jawapan, plaintif-plaintif berhujah bahawa mereka telah memberikan defendan carta topografi yang terkini dan bahawa menurun dan menaikkan sauh tersebut adalah semata-mata tanggungjawab defendan, pekerja atau ejennya.

Diputuskan, membenarkan tuntutan plaintif-plaintif sejumlah RM33,214,656.64 dan USD3,804,611.71 berserta faedah dan kos:

(1) Untuk memastikan sama ada rukun keterangan *res ipsa loquitor* adalah terpakai berdasarkan matriks faktual kes ini, perlu ditentukan sama ada

tiga syarat yang perlu telah dipenuhi. Apabila kapal tersebut melabuhkan sauh dalam kawasan minyak yang mempunyai salur paip dalam laut adalah tidak dijangkakan akan rosak atau pecah salur paip tersebut. Oleh itu, keperluan pertama bahawa kejadian tersebut tidak mungkin berlaku tanpa kecuaian telah dipenuhi. Oleh sebab ketua kapal tersebut telah menggunakan kuasa penuh berhubung semua perkara berkaitan pengurusan dan pengemudian kapal tersebut semasa beroperasi keperluan kedua juga dipenuhi. Syarat ketiga, iaitu bahawa tiada keterangan berhubung bagaimana atau kenapa kejadian itu berlaku. Ini adalah kerana ketua tersebut tidak memberi keterangan dan tiada cerita secara langsung tentang kejadian itu sebelum sauh itu diturunkan oleh ketua atau anak kapal telah diberikan semasa perbicaraan kecuali laporan-laporan itu, yang sama membentuk dengar cakap dokumentar. Oleh itu, kes ini sesuai untuk permohonan doktrin *res ipsa loquitor* (lihat perenggan 42–44 & 50).

(2) Adalah jelas daripada terma-terma kontrak antara pihak-pihak bahawa ketua kapal tersebut diterima untuk dipatuhi secara ketat sebagai amalan yang diterima apabila menentukan bila untuk menurunkan sauh ke dalam kawasan minyak dengan paip-paip minyak dan gas dalam laut. Oleh itu defendan mempunyai kewajipan berjaga-jaga terhadap plaintif-plaintif. Oleh kerana kapal tersebut keseluruhannya di bawah kawalan dan jagaan ketua tersebut dan tanpa kewujudan penjelasan munasabah, halangan dan kebocoran salur paip itu membentuk pelanggaran kewajipan berjaga-jaga yang terletak pada defendan kepada plaintif-plaintif. Akibat daripada pelanggaran kewajipan berjaga-jaga itu, ganti rugi dikekalkan dengan itu melengkapkan ujian untuk kecuaian. Oleh itu elemen-elemen tersebut mencukupi untuk mendapati terdapat asas prima facie untuk kecuaian yang dibuktikan oleh plaintif-plaintif (lihat perenggan 55(a) & 56).

(3) Isu sama ada ketua kapal tersebut menggunakan cara indeks selari dan sama ada dia telah melaksanakannya dengan betul merupakan isu tetapi ketua kapal tersebut tidak dipanggil untuk memberi keterangan. Oleh itu defendan bergantung terutamanya kepada keterangan dengar cakap salah seorang saksinya untuk membuktikan bahawa pada hakikatnya kejadian tersebut adalah disebabkan oleh ketua itu membuat kesilapan dalam melaksanakan teknik indeks selari dan menentukan di mana sauh itu diturunkan. Berdasarkan ketiadaan keterangan berhubung isu penting berhubung apa yang dilakukan ketua tersebut, adalah diikut bahawa defendan telah gagal mematah atau melepaskan inferens berhubung kecuaian yang dibuktikan secara prima facie oleh plaintif-plaintif (lihat perenggan 71–72 & 90).

(4) Orang yang paling baik untuk menjelaskan keseluruhan kejadian hari itu adalah ketua tersebut tetapi defendan gagal untuk memanggil ketua

tersebut sebagai saksi, dengan menyatakan bahawa dia enggan bekerjasama. Berdasarkan pentingnya keterangan saksi ini, kegagalan defendan untuk menyerahkan sepina ke atasnya menyebabkan mahkamah ini membuat kesimpulan bahawa keterangan ketua tersebut jika dikemukakan, akan menjejaskan defendan. Ini adalah kes yang sesuai dan wajar untuk mahkamah ini membuat inferens bertentangan di bawah s 114(g) terhadap defendan (lihat perenggan 92).

(5) Setelah mengambil kira keterangan saksi-saksi yang bersaing dalam perbicaraan, mahkamah mendapati bahawa plaintif-plaintif telah pun mengemukakan carta topografi menunjukkan dengan jelas kewujudan salur-salur paip minyak dan gas tersebut. Dalam apa keadaan, bot bekalan yang berkemudi dalam kawasan minyak itu pasti sedar tentang kewujudan salur-salur paip minyak tersebut sewaktu menjalankan tugasnya. Oleh itu kegagalan plaintif-plaintif untuk mengemukakan carta dan peta admiralti tidak membentuk pelanggaran yang menimbulkan atau menyumbang kepada sebab salur paip tersebut pecah (lihat perenggan 97).

(6) Selanjutnya operator radio seperti PPLP bukan untuk mengarah ketua tersebut menurunkan sauh dan tanggungjawab mengemudikan kapal tersebut termasuklah menurunkan sauh tidak boleh diserahkan kepada PPLP. Oleh itu, keputusan di mana sebenarnya untuk menurunkan sauh terletak pada ketua tersebut. Oleh itu, hujah defendan bahawa PPLP mengarahkan kapal itu melabuhkan sauh menyebabkan ketua tersebut membuat kesilapan telah ditolak. Dengan itu tiada asas untuk menyokong penemuan sumbangan kecuaian terhadap plaintif-plaintif (lihat perenggan 104 & 106).

(7) Mahkamah ini berpuas hati bahawa fasal 21(1) kontrak secara keseluruhannya tidak memperuntukkan had masa kontraktual kerana ia dihujah oleh defendan tetapi ebaliknya beroperasi sebagai fasal indemniti yang memperuntukkan perlindungan dalam dua cabang seperti mana ada; cabang pertama adalah jumlah RM5 juta yang kena dibayar oleh defendan walaupun kesalahan atau liabiliti tidak disebabkan keseluruhan olehnya, selagi kejadian yang dipersoalkan tidak disebabkan oleh kecuaian plaintif-plaintif sahaja; dan cabang kedua hanya timbul apabila liabiliti yang telah ditentukan dan diadili adalah menurut undang-undang. Oleh demikian, tidak ada had masa kontraktual sejumlah RM5 juta berkaitan semua kerugian fizikal yang dialami oleh plaintif-plaintif, seperti mana didakwa oleh defendan (lihat perenggan 133–134).

(8) Untuk bagi tujuan defendan berhak kepada had masa liabiliti di bawah s 360 Ordinan tersebut, defendan perlu membuktikan bahawa kejadian tersebut berlaku tanpa kesalahan sebenar atau privitinya. Undang-undang adalah jelas bagaimana pun bahawa bukan pekerjaan

ketua mahupun pengurus yang kompeten melucutkan pemilik kapal daripada aspek tertentu tanggungjawabnya. Berdasarkan keterangan yang terdapat dalam mahkamah ini bahawa ini adalah kes di mana defendan tidak mempedulikan risiko yang jelas berhubung nahas yang timbul daripada operasi sauh yang defektif dalam kawasan salur paip (lihat perenggan 137, 154 & 188).

(9) Keterangan dalam perbicaraan menunjukkan bahawa plaintif-plaintif telah membelanjakan sejumlah RM34,548,477.64 and USD4,860,440.71 dan bahawa pada masa cadangan pembaikan salur paip yang rosak dan kerosakan struktur lain itu ia sedang menguruskan dua projek yang bersaing, yang memerlukan perhatian. Pada pendapat mahkamah, plaintif-plaintif telah bertindak munasabah menurut keutamaan terhadap salah satu daripada dua projek tersebut. Berdasarkan keterangan juga tiada pertikaian sebenar bahawa jumlah yang dituntut oleh plaintif-plaintif sebenarnya terakru dan dibayar olehnya. Mahkamah ini juga berpuas hati bahawa plaintif-plaintif telah berusaha untuk mendapatkan dan berunding untuk kontrak dan kadar yang munasabah. Walau bagaimanapun, berdasarkan keadaan, mahkamah membenarkan potongan 30% untuk kos-kos bersiap sedia dan pemberhentian dan potongan 30% berkaitan kos-kos waktu gendala akibat cuaca daripada jumlah tuntutan plaintif-plaintif sejumlah RM34,548,477.64 dan USD4,860,440.71 (lihat perenggan 201, 213(c) & 213(f)).]

Notes

For a case on documentary hearsay, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) para 1900.

For cases on duty of care, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1157–1226.

For cases on oral hearsay, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1923–1925.

Cases referred to

Ailsa Craig Finshing Co Ltd v Malvern Fishing Co Ltd and Securior (Scotland) Ltd [1983] 1 All ER 101, HL (refd)

Antara Koh Pte Ltd v Eng Tou Offshore Pte Ltd [2005] 4 SLR 521, HC (refd)

Asiapools (M) Sdn Bhd v IJM Construction Sdn Bhd [2010] 3 MLJ 7, CA (refd)

BHP Petroleum Ltd v British Steel plc [2000] 2 Lloyd's Rep 277, CA (refd)

Bekalan Sains P & C Sdn Bhd v Bank Bumiputra Malaysia Bhd [2011] 5 MLJ 1, CA (refd)

Chamber Colliery Company Ltd v Twyerould [1915] 1 Ch 268, HL (refd)

Chugaway II, The 1969 2 Lloyd's Rep 526 (refd)

Cornish v Accident Insurance Co (1889) 23 QBD 453, CA (refd)

Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd [1997] 1 MLJ 587, CA (refd)
Davis v Bunn (1936) 56 CLR 246, HC (refd)
Ellor v Selfridge & Co Ltd (1930) 46 TLR 236, KBD (refd)
Ert Stefanie, The [1989] 1 Lloyd's Rep 349, CA (refd)
Eurysthenes, The [1976] 2 Lloyd's Rep 171, CA (refd)
Geest plc v Lansiquot [2002] 1 WLR 3111, PC (refd)
Bolton (HL) (Engineering) Co Ltd v V TJ Graham & Sons Ltd [1957] 1 QB 159, CA (refd)
Interpro Engineering Pte Ltd v Sin Heng Construction Co Pte Ltd [1998] 1 SLR 694; [1997] 3 SLR (R) 668, HC (refd)
JK Pte LTd v Lonnpac Insurance Bhd [2011] SGHC 72, HC (refd)
Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd [2004] 3 SLR 288, HC (refd)
Joo Leong Timber v Dr Jaswant Singh a/l Jagat Singh [2003] 5 MLJ 116; [2003] 5 CLJ 286, HC (refd)
Kebatasan Timber Extraction Co v Chong Fah Shing [1969] 2 MLJ 6, FC (refd)
Lady Gwendolen, The [1965] 2 All ER 283, CA (refd)
Lennard Carrying Company Ltd v Asiatic Petroleum Co Ltd [1914–1915] All ER Rep 280, HL (refd)
Malaysian National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud [1979] 2 MLJ 29; [1978] 1 LNS 117, FC (refd)
Malaysian Newsprint Industries Sdn Bhd v Perdana Cigna Insurance Bhd & Ors [2008] 2 MLJ 256, CA (refd)
Marion, The [1984] AC 563; [1984] 2 Lloyd's Rep 1, HL (refd)
Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 3 All ER 918, PC (refd)
Mohammed Shahid Late Mahabubur Rahman v Lim Keenly Builders Pte Ltd (Tokio Marine Insurance Singapore Ltd, third party) [2010] 3 SLR 1021, HC (refd)
Moore v R Fox & Sons [1956] 1 QB 596, CA (refd)
Ng Chun Pui v Lee Chuen Tat [1988] RTR 298, PC (refd)
Owner or other Person Interested in the Ship or Vessel 'the Red Gold' v Sarawak Shell Sdn Bhd and another appeal [2012] 4 MLJ 729, CA (refd)
Rederij Erven H Groen and Groen v The England (Owners) [1973] 1 Lloyds Rep 373, CA (refd)
Richley v Faull [1965] 1 WLR 1454, QBD (refd)
Scott v London and St Katherine Docks Co (1865) 3 H & C 596 (refd)
Southport Corpn v Esso Petroleum Co Ltd [1954] 3 WLR 200, CA (refd)
Star Sea, The [1995] 1 Lloyd's Rep 651, CA (refd)
Star Sea, The [2001] 1 Lloyd's Rep 389, HL (refd)
Subry bin Hamid v Husaini bin Tan Sri Ikhwan & Anor [2006] 6 MLJ 229, CA (refd)
Sunrise Crane, The [2004] 4 SLR 715, CA (refd)
Toledo, The [1995] 1 Lloyd's Rep 40, QBD (refd)

Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd [2005] 1 MLJ 162, HC (refd)
Widdowson v Newgate Meat Corpn [1998] PIQR P138, CA (refd)

Legislation referred to

Contracts Act 1950 s 75
Evidence Act 1950 s 114(g)
Merchant Shipping Ordinance 1950 s 360
Rules of the High Court 1980

TH Liew (Lim Qi Si with him) (TH Liew & Partners) for the plaintiff.
Arun Krishnalingam (Mathew Kurien with him) (Sativale Mathew Arun) for the defendant.

Nallini Pathmanathan J:

INTRODUCTION

[1] This case concerns a supply vessel called 'Borcos Takdir' belonging to the defendant, which dropped anchor in the vicinity of an oilfield, and when seeking to retrieve the same upon completion of its duties, struck, snagged and dragged a sizeable section of the underwater six inch pipeline connected to an offshore platform, causing the oil pipe to rupture. It has cost the plaintiffs a substantial sum to make good the loss and damage suffered.

[2] The plaintiffs, Sabah Shell Petroleum Co Ltd and Sarawak Shell Bhd, referred to collectively as 'Shell' are engaged in offshore oil and gas exploration and production activities in the offshore areas of Sabah and Sarawak. One of these oilfields is the St Joseph Oil Field located approximately 90 nautical miles northeast of Labuan and about 20 nautical miles off the north-west coast of Sabah.

[3] For the purpose of their oil and gas exploration and production activities, Shell operates offshore platform structures including a platform structure designated as St Joseph's (Jackett H) or SJJT-H and an oil rig named the Pride Hawaii, located at the St Joseph's field. SJJT-H, like other offshore platform structures, consists of various connecting pipes including a six inch underwater oil pipeline. Oil pipelines connect the St Joseph Oil Field to several other oil fields to the north and west. There are also gas pipelines and other sub-sea structures present.

[4] Shell requires the use of a variety of vessels for the supply of various types of cargo and materials to its rigs, barges and offshore platforms. To this end the defendant's vessel, the 'Borcos Takdir' was one of the vessels deployed under contract dated 14 October 2002 ('the contract') to deliver such cargoes of food,

equipment, tools and machinery as well as under deck cargo such as diesel, fresh water etc. The scope of work that the vessel was required to perform included the transport of general material as set out above, as well as personnel to and from the offshore platforms.

[5] On 28 July 2004 the Borcos Takdir proceeded to SJJT-H, more particularly to a location close to a mobile jacked up rig, called the Pride Hawaii, at 1930 hours. The Pride Hawaii was jacked up to the SJJT-H platform. The vessel, Borcos Takdir, was required to discharge bulk cargo through the night. Accordingly at 1950 hours when the vessel was about 300 metres from the rig and another oil platform known as the SJV-A platform, anchor was dropped and the stern of the supply vessel secured to the jack up rig legs. By 2015 hours the vessel was moored alongside the Pride Hawaii mobile oil rig, and cargo work was undertaken throughout the night until completion the following morning, ie 29 July 2004. When work was completed at around 1025 hours, the mooring lines were released and the retrieval of the ship's anchor commenced.

[6] At 1035 hours, difficulty was experienced in picking up the starboard anchor. These difficulties were reported to the master. Attempts to heave the anchor continued for another approximately 15 minutes with no chain retrieved. The master then engaged the engine in forward propulsion to try and manoeuvre the vessel so as to break lose the anchor, but with no success. At 1050 hours members of the crew noticed oil bubbling to the surface about 20ft away. At that stage the heaving operations ceased. Now suspecting that the anchor might have snagged and ruptured a pipeline, the master stopped the operation and notified the platform control room. Following instructions from the defendant's designated person ashore ('DPA') the master then released the anchor cable of about fourteen odd shackles into the water at about 1135 hours. At 1630 hours permission was granted to the Master to release the anchor cable. At 1645 hours the cable was slipped on the supply vessel after a marker buoy was attached to its end. The GPS position of the released cable was duly noted and marked. The vessel then left for Labuan.

[7] It was subsequently found upon a comprehensive investigation that the anchor of the Borcos Takdir had snagged and dragged a relatively large section of the underwater six inch oil pipeline connected to the SJJT-H platform, causing the same to rupture. As a result of the substantial force caused by the anchor dragging, some of the metal braces supporting the platform structure both underwater and above water level sustained damage and was dislodged from the jacket. Additionally the riser was ripped off from its connection points with the braces. As such, Shell suffered substantial loss and damage which it now seeks to recover from the defendant.

THE PROCEEDINGS

The plaintiff's claim

[8] By a writ in rem filed on 26 May 2006, Shell commenced the present action against the defendant claiming damages suffered as a consequence of the incident above. In its statement of claim Shell founds its cause of action against the defendant on the tort of negligence and/or breach of duty and/or breach of contract on the part of the defendant, its servants or agents in the navigation, management, operation and use of the vessel the 'Borcos Takdir' and its equipment and apparatus. It relies on the doctrine of *res ipsa loquitur* on the basis that the Borcos Takdir was managed and controlled by the defendants' servants or agents when she snagged and ruptured the six inch pipeline, which, it is contended, comprises prima facie evidence of negligence.

The defendant's defence and counterclaim

[9] The defendant maintains on the issue of liability that the act complained of and the resultant damage was actually caused by or contributed to by Shell's own conduct and that Shell are therefore responsible for the loss in total or are at least contributorily negligent as a consequence of which liability ought to be apportioned. In this context it is alleged that Shell failed to provide the proper topographical field charts with safe anchoring zones which, it is contended, they are obliged by contract to do. Secondly the defendant maintains that the master was told to drop anchor in the position which he did, a fact that Shell was fully aware of. The defendant further contends that Shell through its offshore installation manager or radio room failed to warn the master that he was in danger of dropping the anchor on the oil pipeline.

[10] On the issue of quantum the defendant maintains that Shells' claim is limited under the contract between the parties, by virtue of cl 21(1)(b) to RM5m ringgit being the contractual limit.

[11] If such construction of cl 21(1)(b) is not accepted and it is found by this court that shell may claim damages beyond the RM5m ringgit limit, the defendant pleads the defence of the limitation of liability under s 360 of the Merchant Shipping Ordinance 1950 (statutory limit) on the basis that the incident occurred without the actual fault and privity of the defendant. As such the defendant maintains that it should be liable for no more than the sum of RM5,189,345 (RM5m (contractual limit) and RM189,345 (statutory limit).

[12] If the foregoing defence of a statutory defence is not accepted the defendant then submits that Shell should not recover more than RM26m as

they failed to act reasonably to mitigate their loss.

REPLY

[13] By way of reply, Shell maintains in relation to liability that contrary to the contentions of the defendant, it had provided the defendant with updated topographical charts which enabled the accurate plotting of positions before dropping anchor; those charts indicated the presence of pipelines. Shell further relies on its instruction manual which prohibits the dropping of a vessel's anchor within 300ft of any pipeline. The dropping and retrieval of the anchor was solely the responsibility of the defendant its servants or agents.

[14] With regards to the counterclaim Shell maintains that the defendant is not entitled to limit liability either under the contract or under the Merchant Shipping Ordinance. With respect to the contractual limitation Shell denies that the clause relied upon has the effect of limiting liability to RM5m. Moreover they maintain that the incident was due to the recklessness and/or gross negligence or fundamental breach on the part of the defendant. With regards to tonnage limitation, Shell contends that the defendant failed to properly equip and supervise the master on the procedure of anchor dropping and heaving, failed to maintain an adequate management audit system for safe ship management and navigation procedures.

THE TRIAL

[15] The trial of this matter was conducted over a period of nine days between 15 September 2010 and 18 August 2011. Shell called the following witnesses:

(a) Captain Tiong Kwong Heng, PW1;

(b) Captain Yap Tian Soong, PW2;

(c) Tiong Tai Wan, PW3;

(d) Mohd Nazor bin Tahir, PW4;

(e) Ahmad Zubir bin Mohd Zain, PW5;

(f) Sim Theng Hiok, PW6; and

(g) Thavakumar a/l Kandiahpillai, PW7

[16] The defendant called the following witnesses:

(i) Chung Khiok Yian @ Francis Chung, DW1;

(ii) Rosalind Spink, DW2;

(iii) Sidqi Ahmad Said bin Ahmad, DW3;

(iv) Abraham Klok, DW4;

(v) Captain Henry Tukang, DW5; and

(vi) Captain Jonathan Mark Walker, DW6.

ISSUES

[17] The issues that arise for consideration in relation to both liability and quantum are as follows:

With regards to liability:

(a) whether Shell is entitled to rely on the doctrine of *res ipsa loquitur* such that the onus (not the burden) shifts to the defendant to disprove liability for the incident;

(b) the issue of causation, namely whether the incident was caused by the negligence and/or breach of contract of the defendant or whether it was caused by the errors and/or failures and/or omissions of the plaintiff; and

(c) where the incident was caused by the negligence of either one of the parties, whether the other party is contributorily negligent.

With regards to *quantum*:

(d) The construction to be accorded to the contractual limitation set out in cl 21 of the conditions of contract, namely whether it limits the defendants' liability to a maximum sum of RM5m or otherwise;

(e) whether the defendants are entitled to the benefit of tonnage limitation under the Merchant Shipping Ordinance 1952; and

(f) whether Shell mitigated or failed to mitigate the loss suffered

[18] Before dealing with the issues above, it is necessary to consider the background events leading up to the incident.

BACKGROUND FACTS

[19] From the report tendered by the defendant's expert, Captain Walker, DW6 some salient background facts relating to the parties as well as some of the undisputed facts are comprehensively set out. I take the, descriptions below from his report as well as the Shell incident report and the report by the surveyors, Kasi.

[20] The 'Borcos Takdir is a steel hulled supply vessel of 1369 tons gross, 57.5 metres in length, 13.8 metres in width and 5.50 metres in depth. It was constructed in China in 2002 and is owned and operated by Syarikat Borcos Shipping Sdn Bhd. It is flagged in Malaysia with a port of registry of Labuan. She is classed with ABS. In the forecastle area of the vessel a double windlass is fitted that has two, D14 stockless bower type anchors of 1.2 tonnes in weight, each connected to 15 shackles (about 410 m) in length of 34 millimetre diameter chain cable.

[21] At the relevant time the vessel was properly crewed and manned. The master and chief engineer were fully qualified and the vessel's survey certification comprehensive.

[22] The vessel was chartered to the plaintiffs, shell vide the contract, namely a contract dated 14 October 2002, to provide services in relation to the transport of general material and personnel from and to offshore installations, to standby at rigs and platforms for emergencies, to perform fire fighting operations or life saving operations, to carry out oil spill recovery operations, provide offshore maintenance support and even participate in salvage operations if so required by Shell. All her crew were verified to have the relevant competency certifications. Her master at the material time, one Captain Tom Muar is described as an experienced seaman and had been master of the vessel between 11 October 2003–January 2004 and again from May 2004 until the time of the incident on 28–29 July 2004.

[23] As stated at the outset, the St Joseph Oil Field is located northeast of Labuan and off the north west coast of Sabah. Oil pipelines connect the St Joseph Oil Field to the South Furious Oil Field to the north and to the ERB West Field to the south west. There is an array of offshore structures within the St Joseph Oil Field. There are production systems centred around several platforms known as SJP-A/SJK-A/SJR-A platforms. These platforms are connected by pipelines. For the purposes of the instant case it is relevant that between two platforms known as the SJR-A and SJJT-H platform there are three pipelines that run almost parallel, namely a 12 inch oil pipeline, a six inch oil pipeline and a six inch gas pipeline. These pipelines predate the incident on 28–29 July 2004.

[24] The jack-up mobile rig known as the Pride Hawaii is triangular in shape, measuring 53.250 metres in length and 52.250 metres in breadth with a depth of 7 metres. It has three lattice legs, approximately 28 metres apart, located at the corners of a triangular deck.

[25] There are several accounts of the incident, including the master's version of events as documented (he was not a witness in these proceedings),

Shell's investigation report, the defendant's investigation report, the surveyor, Kasi's investigation report and Captain Walker's summarisation of the incident. I have sought to set out a brief description of the incident from these various sources. Where they are in dispute, this is indicated.

[26] On 28 July 2004, the Borcos Takdir departed from the Barton Oil Field off Sabah to proceed to the St Joseph Oil Field on receipt of instructions from Shell. She arrived at the location, ie the Pride Hawaii, at approximately 1930 hours. As stated at the outset the Pride Hawaii was jacked up to the SJJT-H platform on a heading of about 306.

[27] The vessel was required by the rig operator to discharge bulk cargo overnight and accordingly instructions were received from the Pride Hawaii via the rig's radio room to drop anchor and secure the stern of the Borcos Takdir to the jack up rig legs on the latter's port side.

[28] It appears that a tool box safety meeting was then held between the Master and several members of his crew. The precise details of what then happened on board the Borcos Takdir can only be gleaned from documentation prepared after the occurrence of the incident as no, witnesses of fact in relation to this issue were called as witnesses. The content and nature of the discussion at the tool box meeting is therefore uncertain. It would appear from the documentation and interviews conducted by Shell, the surveyor and the defendant that after considering the prevailing weather conditions, surface current and the vessel propulsion power the master determined to drop anchor prior to going astern to tie up the stern to the rig. It appears that the master may have adopted the parallel indexing method to determine where the anchor was to be dropped. The Shell report prescribes that he carried out this method by maintaining a heading of 270 degrees with a minimum range of 300 metres or 0.16 nautical miles parallel to SJV1 and planned to drop anchor when the radar ring of 0.16 nautical miles touches the image of the ring. It does not appear that any actual plotting was effected on any of the relevant charts. This comprises one of the issues in dispute.

[29] Following the meeting at about 1950 hours, when the vessel was about 300 metres or 0.16 nautical miles from the rig and the SJV-A platform, the Master gave instructions to drop anchor. The starboard anchor was immediately released to two and a half shackles or 68 metres on deck. The anchor windlass was put on brake whilst the master had to change to the aft control from forward control. A GPS position of 06D 38.772'N, 116D 08.855'E was recorded in the rough log book and chief officer's log book. This was also recorded by the Pride Hawaii radio room. There was a time lapse of

about five minutes before the master resumed control at the aft control. The anchor chain was then gradually released as the master manoeuvred the vessel astern towards the rig.

[30] By 2015 hours the vessel was moored alongside the Pride Hawaii. Her anchor chain was secured tight. The vessel was now lying at an almost perpendicular attitude to the line of the port side of the rig. The weather conditions during this time were subsequently advised as a westerly wind of about 5–8 knots, and a slight sea swell. Cargo work commenced and continued throughout the night. The cargo operations were completed the following morning, 29 July 2004.

[31] At 1025 hours on July 2004, the morning lines were cast off and the retrieval of the anchor commenced. At about 1035 hours when the anchor chain length was two shackles on deck with over one shackle remaining in the water the crew experienced difficulties in heaving the anchor. According to reports the crew suspected that the starboard anchor may have lodged in coral on the seabed. The master was informed. Despite continuous attempts to heave the anchor for approximately 15 minutes no chain was retrieved. The master then used the engine forward propulsion in an attempt to break loose the anchor. However the vessel suddenly swung to port instead.

[32] At 1050 hours the chief mate or Bosun noticed oil bubbling to the surface and reported this to the master. The heaving operation was aborted immediately and the alarm raised for all hands on deck. The master notified the SJK-A platform control room of the oil leak and to close the pipeline valves as he suspected his anchor might have hooked onto a pipeline. At 1100 hours the master reported the incident to the Shell Labuan radio control room. He also reported the incident to the defendant's designated person ashore (DPA).

[33] The chief mate was then instructed to pay out the anchor chain quickly to ease the tension and to allow the master to manoeuvre the vessel away from the oil bubbles. At 1135 hours the anchor cable was paid out to about 14 shackles in the water and at 1630 hours permission was granted to the Master to release the anchor cable. At 1645 hours the starboard anchor chain was released together with a marker buoy attached to it using a 150ft long rope. The GPS position of the anchor chain was duly noted. The master then reported the position of the marked sunken anchor chain to the defendant, Shell, SJK-A and the Pride Hawaii. Thereafter the vessel assisted in dispersing the oil leak whereupon it set sail for Labuan.

[34] Shell, through, Captain Tiong, PW1 alerted the emergency team when the incident was reported to him on 29 July 2004. This was necessary to ascertain whether all requisite issues such as environmental pollution could be

addressed expeditiously. Captain Tiong led the Shell investigation team to carry out investigations. The primary purpose was tb determine the cause of the casualty so as to prevent recurrence. According to Shell, safety was its paramount concern.

[35] Shell invited several of the defendants' senior management personnel to participate including the DPA, Francis Chung, DW1, Mohd Morshidi, the safety manager and captain tukang the fleet manager. The results of the Shell incident report set out the events described above. Suffice to say that according to Captain Tiong in the course of his oral evidence, the master was asked to demonstrate the manner in which he determined his anchor location before dropping anchor. Captain Tiong testified that he observed the demonstration. He concluded that the method explained by the master was flawed, as it could not in any way effectively or precisely locate the position for anchor drop so as to avoid contact with underwater pipelines. This conclusion is in dispute as the defendant maintains, particularly through the expert witness, Captain Walker that the parallel indexing methodology adopted by the Master was more than adequate to accurately plot the position for anchor drop. Shell duly issued its incident investigation report. The defendant also issued their own incident investigation report following their investigations and prescribed four recommendations to prevent recurrence themselves.

[36] What then was the damage suffered? The Shell incident investigation report records that the 6 inch diameter oil pipeline from SJR-A to SJJT-H, ie the middle of the three pipelines between the two platforms had been lifted, kinked and deposited over the more northern 12 inch oil pipeline at a location of about 1,100ft from platform SJJT-H. The seabed survey showed that this pipeline had been displaced from its original location, which was visible as a scar on the seabed. Additionally, at the kink, the 6 inch oil line was found to be wedged between the fluke and shank of an anchor. It would appear to be the starboard anchor of the Borcos Takdir. The damage suffered is not in dispute.

[37] The snagged six inch pipeline was punctured and had a hole approximately 0.5 metres in diameter at this juncture. Additionally at the SJJT-H platform the 6 inch oil pipeline riser clamp and a jacket longitudinal member were found broken at an elevation of -23.0 metres. A 12 inch pipeline riser was also slightly bent at the clamp between elevation -23.0m and -0.39 m. This is evident from the results of a survey conducted by Sarku Engineering Services Sdn. Bhd. between 31 July–1 September 2004, on behalf of Shell.

[38] On 30 August 2004 a meeting was held between the reprsentatives of Shell and the defendant to discuss issues arising from the incident. On 1 September 2004, the defendant conducted a domestic inquiry against the master relating to the incident. The minutes of this inquiry were made available

by the defendant in the course of trial, although the master was not called as a witness. Thereafter the master ceased to be employed by the defendant although it is unclear whether he was dismissed or resigned.

[39] The defendant through their solicitors engaged in a series of correspondence with Shell which related primarily to the provision of security for Shell's claim and the withholding of charterhire by Shell. On 11 October 2004 the defendant furnished by way of a letter of undertaking the sum of USD10m issued by The Shipowners Mutual Protection and Indemnity Association (Luxembourg). Legal proceedings were commenced thereafter on 26 May 2006. The proceedings have been comprehensively described above as have been the issues and I now proceed to consider each of the issues in turn relating first to liability and then to quantum.

LIABILITY

Issue (i): Whether Shell is entitled to rely on the doctrine of res ipsa loquitur such that the onus shifts to the defendant to disprove liability for the incident

[40] The plaintiff submits that this is a fit case for the court to invoke the presumption/doctrine of *res ipsa loquitur*. It is pointed out that there is no dispute that the anchor dropped from the Borcos Tadir and snagged and ruptured the 6 inch underwater pipeline connected to SJJT-H. Such an incident ought not to have happened at all in the ordinary course of good seamanship and therefore, it is contended, this amounts to prima facie evidence of negligence on the part of the master. In short the contention is that the facts of the incident speak for itself. The defendant submits to the contrary that this is not a fit and proper case for this court to invoke this evidential rule for reasons to be considered further below. Before doing so it is appropriate to consider the parameters which allow for this evidential rule to be invoked.

[41] *res ipsa loquitur* allows a court to infer carelessness or negligence on the part of a defendant where the claimant can show that the nature of the accident suggests both negligence and the defendant's responsibility. The Latin term represents a rule of evidence and does not set forth a principle of law. As stated in *Clerk & Lindsell on Torts* (20th Ed): '… It is only a convenient and label to apply to a set of circumstances in which a claimant proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. He merely proves a result, not any particular act or omission producing the result. *res ipsa loquitur* which stems from the judgment of Erie CJ in *Scott v London and St Katherine Docks* (1865) 3 H & C 596 applies where (1) the occurrence is such that it would not have happened without negligence, and (2) the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for

whom he is responsible or whom he has a right to control. If these two conditions are satisfied it follows, on a balance of probability that the defendant, or the person for whom he is responsible, must have been negligent. There is, however, a further negative condition: (3) there must be no evidence as to why or how the occurrence took place. If there is, then appeal to*res ipsa loquitur* is inappropriate for the question of the defendant's negligence must be determined on that evidence.'

[42] To ascertain whether the evidential rule of *res ipsa loquitur* is applicable on the factual matrix of this case, it needs to be determined whether the three conditions set out above are satisfied. The first is that the occurrence is such that it would not have happened without negligence. Here an anchor was dropped near or onto, and subsequently snagged a stationary oil pipe on retrieval. An analogy can be drawn with bales of sugar falling from hoists, cranes collapsing, or trains colliding. Where a car veers on to the pavement hitting a pedestrian (*Ellor v Selfridge & Co Ltd* (1930) 46 TLR 236), or where a vehicle veers on to the opposite lane hitting another vehicle (*Davis v Bunn* (1936) 56 CLR 246) or skids (*Richley v Faull* [1956] 1 WLR 1454) an inference of negligence has been held to arise. In like manner, a ship dropping anchor in the vicinity of an oil field with sub-sea pipelines is not expected to damage or rupture pipelines. Vessels routinely traverse these routes within oilfields to transport goods and personnel as described at the outset. It is not expected that in the course of the provision of such services, they might damage the stationary sub-sea oil pipe lines that are marked on topographical charts provided to these transport vessels. The clear inference to be drawn is that the incident could not have happened without negligence. The first requirement is therefore satisfied.

[43] With regards to the second requirement, namely that 'the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control', it follows that the starboard anchor and the dropping of such anchor as well as retrieval, was under the sole management and control of the master, over whom the defendant enjoys a right of control. The master exercised full authority on all matters relating to the management and navigation of the vessel whilst in operation. This was borne out by the defendant's witness, DW5 who testified that the master enjoys overall command of the operations of the vessel, and that the master was employed by the defendant. As such it would appear that the second requirement is also met.

[44] Finally with regards to the third negative condition, namely that there must be no evidence as to how or why the occurrence took place, this requires further examination. If the question is posed, how or why was the anchor dropped at or near the oil pipe line giving rise to the snagging on retrieval and subsequent rupture, several factual issues arise for consideration. However

from the evidence led throughout the trial, albeit by the plaintiff or the defendant there is no direct or first-hand account of how or why the anchor was dropped at the particular location where the incident occurred. The master of the vessel was not called upon to testify in court. Neither were any of the other crew members who saw or participated in the events giving rise to the incident on 28–29 July 2004. In short no direct evidence of the events giving rise to the incident was available at trial. The evidence that is available to this court is entirely from testimony of witnesses who subsequently queried or spoke to the master and other crew members. This evidence, emanating from; for example, PW1, PW2 and others, comprises hearsay. It is an account of the events relating to the incident which were recounted to these witnesses. It is trite that any such evidence cannot comprise admissible evidence to be utilised for the purposes of ascertaining the truth of the events which occurred on 28–29 July 2004. It comprises admissible evidence of the fact that these witnesses were actually appraised of these facts by the primary witnesses, no more.

[45] It follows that the fact that the reports prepared by witnesses such as PW1, as well as the authors of all the other incident reports equally amounts to documentary hearsay. The fact that they set out in writing the content of their interviews with the master and other crew members in no way alters the nature and evidential value of those reports. They cannot comprise evidence of the truth of the events which occurred at the time of the incident for the purposes of ascertaining the precise cause of the incident.

[46] For example the Shell investigation appears to have placed the cause of the accident as having arisen because the master, they contend, based on their interview with him, failed to carry out the parallel indexing method correctly and failed to plot the precise location for anchor drop on the relevant admiralty map. This contention however is disputed by the defendant, as is evident from a perusal of the cross-examination of PW1. There are no agreed facts as to how or why the incident arose.

[47] The defendant's expert, DW6, Captain Walker, on the other hand contends that the master utilised the correct method of parallel indexing to ascertain the position at which to drop anchor, but erred in his calculation or computation. This opinion is premised on the basis that the master did in fact carry out the parallel indexing method, a fact which is in issue and which has not been proved by way of primary or direct evidence.

[48] This is because the master did not testify. There is therefore no direct or primary account of the events immediately prior to anchor drop by the master or the crew, save for the reports, which, as has been explained above, comprise documentary hearsay for the purposes of ascertaining the truth of the events occurring on board the Borcos Takdir immediately prior to the incident on

28–29 July 2004. Neither are there an agreed set of facts which would enable the court to determine the cause of the incident. It is therefore not possible to ascertain precisely what was done by either the master or the crew in relation to the planning or execution of the anchor drop on 28 July 2004. In the absence of such direct evidence this court is unable to ascertain precisely how or at what stage the events giving rise to the incident occurred. The net result is that the precise cause of the incident remains unknown. Shell and the defendant have put forth slightly different factual bases for the cause of the incident, both of which however are premised on second hand accounts of the events of the day. In these circumstances it appears to this court that in the absence of any agreed facts, this court cannot determine, on the basis of the hearsay or indirect evidence before it, precisely how or why the occurrence took place. That must be a matter to be determined on the basis of primary or direct evidence. Such direct or primary evidence can only come from the master who had full control of the vessel and therefore the anchor, or members of the crew who witnessed or participated in the events giving rise to the incident.

[49] In adjudicating as aforesaid, I have considered the submissions of learned counsel for the defendant who has stated that the evidence on how the incident occurred is before the court by way of the various reports from Shell, Borcos, Kasi and the statements of the master and crew. However as pointed out above, these investigation reports as well as the testimony of witnesses such as PW1 and PW2 comprise documentary and oral hearsay respectively. The use of these reports to prove the truth of facts pertaining to the precise cause of the incident is therefore not tenable. There is no undisputed evidence before the court of precisely what the master did prior to anchor drop on 28 July 2004. It is not clear whether he did not carry out parallel indexing, as there is no primary evidence of this fact. It is not clear whether there was any plotting on the admiralty charts or whether there was sufficient reference to the same. It is not clear what the contents of the tool box meeting were prior to anchor drop. In the absence of any direct evidence on these material facts, the observations and testimony of the witnesses, both for the plaintiff and the defendant, amount to speculation and conjecture. In stating so, I am aware that Shell and the defendant as well as the reports of the various investigation entities such as Kasi set out the details pertaining to the events which occurred in chronological order on that day. However these documents are 'silent' as to precisely what the master did or did not do on the fateful day. These evidential gaps or lacunae, which comprise the bedrock of causation or proximate cause, can only be filled by the direct testimony of eye witnesses such as the master or the crew.

[50] As such I am constrained to conclude that notwithstanding the several investigation reports that have been lodged in respect of this matter, there is no direct evidence before this court which enables it to determine with precision how or why the incident took place. In coming to this conclusion, I have

considered that it is known that the cause of the subsequent rupture of the pipeline was due to the continued heaving of the anchor despite the master being appraised of the anchor having snagged a sub-sea structure, and additionally, utilising the vessel's engine to forward propel the vessel in an attempt to free the anchor. It might therefore be argued on this basis that the cause of the rupture is in effect known. However the primary evidence of how or why the master dropped anchor at that location remains the primary cause or root of the incident. That is not known. As such it appears that the third negative condition is also met and therefore this is a suitable case for the application of *res ipsa loquitur*.

[51] In the case of *South Port Corpn v Esso Petroleum Co Ltd* [1954] WLR 200 where the steering gear in the defendant's tanker was defective the master there jettisoned 400 tonnes of oil cargo which was carried by the tide to a foreshore belonging to the plaintiffs there. This caused considerable damage and the plaintiffs sued. The Court of Appeal in the United Kingdom held that the doctrine of *res ipsa loquitur* applied and as such the onus shifted to the defendant to rebut such negligence. Singleton LJ stated as follows:

> … I look upon the case in this way: the stranding of the vessel on the revetment wall was an unusual happening, something not likely to happen even in bad weather in this channel if proper care was taken. Other vessels made the journey successfully. Thus an explanation is called for from the defendants. I think this was the opinion formed by the judge. He appears to have considered that it was a case in which the doctrine of *res ipsa loquitur* applied.

[52] Similarly in *Moore v R Fox & Sons* [1956] QBD 596 a workman was killed by an explosion while operating a de-rusting tank. The explosion was caused by the accumulation of unburned gas which exploded due to exposure to flames from burning jets which were part of the system. However the reason why the gas accumulated was never determined. On those facts the court held that *res ipsa loquitur* applied.

EFFECT OF THE APPLICATION OF *res ipsa loquitur*

[53] What then is the effect of applying *res ipsa loquitur* in this case? It would appear that by invoking this evidential presumption, the facts by themselves giving rise to the rupture of the oil pipe justify an inference of negligence, without Shell having to prove the same. It then becomes incumbent upon the defendant to rebut this inference of negligence by providing a plausible reason or explanation. It is important to note that the burden of proof does not shift to the defendant. If the defendant succeeds in rebutting the inference of negligence by showing that the incident arose by reason of the omissions or

fault of Shell, or by providing some other plausible explanation, then this will redress the balance of probability, leaving the burden on Shell to establish its case by positive evidence.

[54] In redressing such balance however it is incumbent upon the defendant to provide some 'colour of probability' about his assertion. It is insufficient to put up theoretical possibilities, (see *Clerk & Lindsell on Torts* (20th Ed), *Ng Chun Pui v Lee Chuen Tat* [1988] RTR 298 and *Widdowson v Newgate Meat Corp* [1998] PIQR P138).

[55] If I am wrong in concluding that *res ipsa loquitur* applies on the facts of this case and the burden of proof remains with shell, the plaintiff, to establish negligence on the part of the defendant in relation to the anchor snagging and rupturing the oil pipeline within the ambit of the statement of claim, it follows that prima facie, to establish negligence the evidence adduced by Shell at trial should be considered to ascertain whether the three essential elements comprising negligence were made out, namely the existence of a duty of care owed by the defendant to Shell, a breach of such duty of care and loss or damage suffered as a consequence of the breach of such duty of care. Such negligence is established, to my mind, by the following facts and evidence:

(a) the first stage of the test to establish negligence is the existence of a duty of care. This is borne out by the contractual documents between Shell and the defendant. Put simply, the defendant owed a duty of care to Shell to ensure that the vessel, Borcos Takdir when anchoring within the oil field zones with a view to unloading or transporting goods and personnel, did so safely, efficiently and without causing damage to the stationary sub-sea oil pipe lines comprising a part of Shell's operational structures in the production oil and gas. This is borne out by several clauses in the charter agreement. Clause 4 for example provides as follows:

> (1) The Contractor shall comply with all instructions with regard to the work that are issued by the Company. *The Contractor shall perform the work in accordance with the requirements of the Company and in accordance with accepted standards of the industry and in compliance with all relevant laws and regulations and in such a manner as will always safeguard and protect the Company's interest.* The Contractor warrants that it has the experience and capability including sufficient and competent supervisory and other personnel and all necessary facilities to efficiently and expeditiously perform the work. The Contractor further warrants that it shall provides such personnel and facilities for the duration of the contract …

Clause 24(1) provides that the defendant its employees, servants and agents are bound to strictly comply with all relevant statutory and company regulations pertaining to occupational safety and health and environmental protection applicable to the location where the work is performed. It further provides that the defendant is to comply with the

requirements of the HSE manual and security safety and environment policies, procedures and guides. *Clause 24(2)* provides that the defendant is to be wholly responsible for the working practices and training of its employees and to ensure that HSE practices are followed such that duties are carried out in a safe and efficient manner.

It is clear from these provisions that there is a clear duty imposed upon the defendant to adopt and to strictly adhere to sound and accepted HSE practices when determining where to drop anchor in an oil field with sub-sea oil and gas pipes. As such there is a duty of care owed by the defendant to the plaintiff under the terms of the charter contract dated 14 October 2004.

(b) On 29 July 2004, when retrieving its starboard anchor which had been dropped the previous night, it snagged and ruptured the stationary submerged oil pipe line in the course of retrieval. As the vessel is entirely under the control and care of the master, prima facie, and in the absence of a reasonable explanation, the snagging and rupture of the submerged stationary oil pipe amounted to a breach of the duty of care owed by Borcos to Shell. This therefore establishes the second stage of the test, namely that of a breach of the duty of care owed; and

(c) as a consequence of anchor snagging on the oil pipe line, it ruptured causing oil to leak and spill and considerable other damage to Shell's platform. It is therefore clear that as a consequence of the breach of the duty of care owed by Borcos to Shell, damage was sustained, thereby completing the third stage of the test for negligence.

[56] Thus the elements sufficient to found a prima facie basis for negligence stands established by Shell. The onus then shifts to the owners to rebut the charge of negligence and breach of duty by showing that the cause of the anchor snagging the oil pipeline and consequent rupture was a cause not produced by them but, as pleaded by the defendant, arose as a consequence of the negligence of the Shell itself.

Issue (b): The issue of causation, namely whether the incident was caused by the negligence and/or breach of contract of the defendant or whether it was caused by the errors and/or failures and/or omissions of the plaintiff; and

Issue (c): Where the incident was caused bv the negligence of either one of the parties, whether the other party is contributorily negligent

[57] Whether applying the evidential presumption of *res ipsa loquitur* or the principles of the law relating to negligence, as set out above, the onus now shifts to the defendant to rebut the inference of negligence that arises from the factual matrix described above. In rebutting the claim of negligence, the defendant

maintains that the incident was caused by the negligence of the plaintiff and not the defendant, primarily in failing to provide adequate admiralty charts and maps and secondly in its offshore installation manager at the Pride Hawaii, instructing the vessel to drop anchor, when it did so on 28 July 2004. The first omission, it is contended, resulted in the master making an error in the course of carrying out the technique of parallel indexing. The second act on the part of the OIM is alleged to have compounded or added to the first error.

[58] The defendant's contentions as to the cause of the erroneous anchor drop and subsequent retrieval and snagging of the oil pipe is in direct contra distinction to Shell's contentions on the cause of the incident. Shell attributes the cause of the incident to the failure of the master to plot his anchor drop position, as a consequence of which the master did not realise that he was on top of an oil pipeline. This cause places the fault element entirely on the defendant. Given these two competing theories as to the cause of the incident it is incumbent now to consider the same with a view to ascertaining, if possible, the actual cause of the incident on 28 July 2004. It must also be borne in mind, given the concerns expressed earlier about the paucity of direct evidence on the issue of causation, that the actual cause may not be discernible on the record of evidence before this court.

[59] In determining or adjudicating on the issue of causation therefore, it is necessary to briefly consider the salient portions of the evidence of the parties and their witnesses as to the cause of the incident, bearing in mind that the onus has shifted to the defendant to rebut the inference of negligence.

THE CONTRACT

[60] The defendant first pointed out the relevant clauses in the charter agreement that require Shell to provide adequate admiralty charts and maps. Under the section headed 'Provisions by Company' the first provides as follows:

> INFORMATION
>
> Company (Shell) shall provide pertinent information available to the Company for the Contractor (Defendant) to interpret and apply at its own discretion in the performance of the work.

[61] Shell had issued a set of 'Charterers Instructions to Masters of Vessels'. Such instruction applies to:

> … all Anchor handling/supply and Supply vessels engaged in the carnage of cargo, towing and anchor handling operations related to the offshore operations on the vessels chartered by SM-EP.

Part 20 of these instructions provides as follows:

> Anchoring near offshore installation should be conducted with extreme caution. To this end a set of location chartlets are provided when the vessel is on hire to indicate pipeline locations and other subsea structures. Safe anchoring areas to assist in setting up and to discharge to platforms are indicated on these chartlets.

[62] It further provides at Part 20.4 that:

> Master is not to lay their vessel's anchor within 300 feet of any pipeline or underwater structure. Also, no anchor may be laid across a pipeline or within 450 feet radius from a platform/jacket/vent stack.

[63] Part 20.3 stipulates that:

> No vessel can moor to an offshore installation without prior approval from Shell Labuan or the Platform Operation Supervisor.

[64] And finally Parts 20.5 and 20.6 state:

> 20.5 Any vessel coming alongside Rigs/Platforms/lnstallations is to follow any specific mooring arrangement provided for the Rigs/Platforms/Installations. In the absence of any specific arrangement, vessel is to adhere to any of the following options:
>
> (•) Drop anchor and back in with the stern moorings provided by the Rigs/Platforms/lnstallations.
>
> (•) Instead of using her own anchor (above), vessel to tie up to supply vessel LCT if provided.
>
> (•) For vessel fitted with bow and stern thrusters, dropping of anchor or typing up to Rig/platforms/installations may not be required if agreed by the DS/OIM on the rigs/Platforms/lnstallations
>
> 20.6 In all cases the DS/OIM on the Rigs/Platforms/lnstallations will have the right to enforce its own mooring procedures, i.e. in case of bad weather to halt the mooring till weather improves.
>
> Master is not to lay their vessel's anchor within 300 feet of any pipeline or underwater structure. Also, no anchor may be laid across a pipeline or within 450 feet radius from a platform/jacket/vent stack.

[65] Premised on these provisions listed above, the defendant maintains that Shell was under an obligation to provide adequate charts including an indication of safe anchoring zones with information of sub-sea structures. Additionally the defendant submits that there is a further duty during the

discussion between the master and the offshore installation manager for the latter to advise or inform on the presence of sub-sea structures when the vessel is instructed to drop anchor. On the premise that such duties exist, the defendant maintains that Shell failed to provide adequate admiralty charts and failed, through its offshore installation manager to warn or advise the master of the existence of sub-sea structures in the course of the discussion between them when the master was given permission to drop anchor. Accordingly the defendant maintains that Shell caused or contributed to the cause of the rupture.

CAUSATION

The defendant's case

[66] In order to ascertain if this indeed was the case it is necessary to next examine in greater detail how the incident or accident actually occurred. The defendant in the course of its submissions maintained that there was no dispute about how the incident occurred. It was accepted that the master of the Borcos Takdir dropped the anchor on the 6 inch oil pipeline and then dragged and damaged it when he attempted to force the retrieval of the anchor the next day. However on the issue of the essential question of what caused the master to do this, and to what extent each of the parties failed to abide by their contractual obligation, the defendant relies on the testimony of its expert, Captain Walker, DW6, and Captain Henry Tukang, DW5. In essence the defendant seeks to maintain through these witnesses that the incident,was caused by the master making a mistake in the distance he applied when doing the parallel indexing.

[67] It is submitted by the defendant that it is undisputed that the method used by the master of the Borcos Tadir on the date of the incident to approach the platform was 'parallel indexing'. It is significant that the only evidence pertaining to the alleged methodology utilised by the master in determining where to place the anchor is that of Shell's witness, PW1 and a reference to the same in the defendant's investigation report.

[68] PW1 testified that the master in the course of the investigation demonstrated the method he claimed to have utilised prior to anchor drop, namely parallel indexing, but did so erroneously. This portion of the testimony however was strongly refuted by the defendant when cross-examining PW1. It was variously put to him that this matter had not been set out in the Shell investigation report and was very much an afterthought. In other words the veracity of this portion of PW1's evidence on the issue of the use of parallel indexing by the master, was strongly challenged. The substance of the challenge was whether or not he had carried out this method correctly. PW1 maintained on the basis of the demonstration witnessed by him and others the following

day that parallel indexing was carried out erroneously. His statement on this issue was however challenged as shown below:

Q: Now, could you please look at Q & A 37 and 38. Your answer to Q 37 is '…He did not give any plausible explanation…' (reads the rest of the answer). Now that answer is not entirely correct, the Master said that he used a method called parallel indexing to reach the position to drop the anchor?

A: Yes he did mention. It was captured in the report.

Q: Now, I also understand and am instructed that the following day, the 2nd day at Labuan, your investigation team took the master out and made him demonstrate if he knew how to do parallel indexing correct?

A: Yes on the following day, we board the vessel and asked the Captain to demonstrate how to do parallel indexing and drop anchor and it was not carried out satisfactorily.

Q: That seems to be your answer in Q & A 39 'I observed the method and came …' *So is it that he didn't know how to do it properly or the method itself was flawed?*

A: *He did not do it properly.*

Q: *Could you look at your report in Bundle 5, page 1749. Can you point us to the paragraph where you took him out and he didn't know how to do the parallel indexing?*

A: *It's not been captured here.*

Q: *I put it to you the reason why it is not in the report is that the Master did it correctly which is why you couldn't find fault with him.*

A: *No I don't agree.*

Q: I am instructed that in fact parallel indexing when done correctly is a fool proof method of arriving at the place you want to be.

A: Yes if it is carried out correctly. (Emphasis added.)

[69] It is clear from the foregoing that the issues of fact, namely whether the master undertook the parallel indexing method, and whether he carried it out correctly or otherwise is in issue.

[70] Therefore to now submit that the methodology utilised by the master was parallel indexing and that this is undisputed does not appear to be consonant from the position taken at trial and the evidence. There is no record either of any agreed fact or matter between the parties to the effect that parallel indexing was the methodology applied by the master.

THE MASTER WAS NOT CALLED AS A WITNESS AT TRIAL

[71] As the master was not called to testify, it remains unclear whether in fact the master did, on 28 July 2004, undertake or carry out the parallel indexing method prior to dropping anchor. We only have the documentary hearsay of the defendant's investigation report and PW1's oral hearsay on this point. Even if it is accepted that the master did in fact carry out parallel indexing it is unclear what method he adopted or the details of what he did because he did not appear in person to explain the same. In other words the facts pertaining to precisely what the master did prior to dropping anchor remain unclear on the record of evidence before this court. Such evidence as there is, is insufficient to establish what the master said or did or took into account. As the master was not called to tender evidence as to precisely what steps he took prior to dropping anchor, all other evidence pertaining to this issue is ultimately hearsay and inadmissible for the purposes of establishing the truth of what he did.

[72] As stated earlier, the defendant relies primarily on the evidence of Captain Jon Walker, DW6 to seek to establish as a matter of fact, that the incident was caused by the master making a mistake in the distance he applied when performing the technique of parallel indexing in determining where to drop anchor.

[73] Turning to his evidence, he set out extensively in the course of his evidence in chief and cross-examination, the mechanics of parallel indexing as a means of approaching the platform. In his report he states as follows:

> … The master was reported to have described to the SSB/SSPC and Borcos Shipping Investigation teams that he decided to utilise the radar parallel indexing technique to monitor his approach, stern first, to the jack up rig from the west An index line of 0.16Nm was set off the SJV-A vent on a heading of 090°/270°
>
> When the vessel's radar ring showed it was 0.16Nm from the rig, the anchor was let go. A position was recorded from the '06°38.722'N 116° 08.855E"

[74] He then opined:

> Using the parallel indexing method in this situation was undoubtedly the correct method. It allows the vessel's movement relative to a fixed point to be carefully monitored and controlled with a great deal of accuracy … Plotting a vessel's position on a paper chart is non continuous and therefore is not optimal for critical navigation — even though a satellite position may be being received continuously, it is of no use until plotted on a chart. Although this should only take a small amount of time, it may be a sufficient amount of time to distract the Master at a critical moment.

Parallel indexing is a simple and useful method of monitoring cross (off planned course line) track tendency in both poor and good visibility. It uses an electronically generated or physically plotted straight line which is set by the operator and that remains fixed on the radar screen. The line is fixed at the intended passing distance from a radar conspicuous point or mark and at an angle which is the same as the ship's intended course.

The parallel indexing technique on its own does not fix the ship's position but provides a method on the radar of verifying that the ship is maintaining a safe track to pass a fixed object at a predetermined distance. *However with the specific method of parallel indexing used by the Master on 'Borcos Takdir' it also provided a means of fixing the position of the vessel for dropping the anchor. That is, although a position line is drawn on the radar on 90/270 track along which the echo of the SJV-A target moves, a range ring of 0.16Nm will also be activated. When this range ring touched the echo of the rig on the radar a position is fixed by the intersection of the range ring and the parallel index line, that is, the intersection of two position lines … Consequently the method utilised by the Master not only monitored the accurate movement of the vessel, but also fixed its position for dropping anchor. The parallel indexing technique is fool proof if set up correctly.* (Emphasis added.)

[75] And in the course of his examination-in-chief this is what DW6 said:

Q: Position fixing and use of parallel indexing. Take us through.

A: The master in his report to investigation team explained how used parallel indexing on his anchoring …

However it should be noted that in none of the investigation reports is there an account from these investigating teams as to how the Master used parallel indexing.

A: … To anchor a vessel, you have to prepare yourself prior to that in order to know where you want to put the anchor. *What the master is doing is choosing a point, once he got the point he wants to put the anchor he will create a parallel index using distances of visible structure where he can set on radar and bearings.* Now this is a very, very useful tool. *He uses line 2,. A line on radar, straight line on a bearing that he wishes to approach the target. He will then use his range to determine the distance of which he wishes to pass then use electronic bearing line down the range ring at the same angle he required.* On the radar, the ship is usually in the centre. *If the master keeps to that heading line, which is a parallel to this elec index line, as long as that target he picked up keeps on its elec line until he comes astern, he is following his path. This creates a position line. Sets up a 260 90 degrees. He keeps his heading on west 270. He keeps position. He has fixed that position. All he needs to do is maneuver, put radar echo on that line, moves vessel astern, monitor the vent, if it starts to drift off, he moves along, keeping position.* Very good system, plotting position all the time, GPS, radar takes time to do so. PI gives continuous monitoring. Cannot fix position on that line. Method master used, he has fixed position and range from the pipeline. So he has two position line crossing. *He actually said I want to go into that position.* This

far away from vent this far away from line. As long as kept vent on parallel index line, when range ring gets to that line, has fixed the position;

Q: Useful time to show the chart. Visual Aid. Witness explains using the chart (Parallel Indexing Technique). Using two position lines. Minimum needed to fix position. *He keeps clear of the objects he wishes to stay clear off. Method used to fix position has he has chosen a position off the pipeline. The method used did fix the position.*

Q: This is the position fixed in advance of doing parallel indexing

A: *From the descriptions given this is how he has described it.* It is a very good method but it has to be done correctly.

Q: Now. In 4.3.3, parallel indexing Correct method (reads). Plotting on paper chart.

A: *Plotting on paper chart. He has to create this parallel index. To do so he has to use the chart, the topo chart in this case. He looks at that drawing, he knows he has to keep distance away and he knows the scope of his cable.. He picks the point using measurements, keep clear of 300 feet of pipeline, use these distances to fix position, look at those position and know that's where my anchor wants to be. Once has chosen position, he can then take distance of 0.16 to create parallel index line, distance off PH. That is where he wants to go, he will put pencil mark. Takes the distance knows bearing to fall back on, that is where he wants to put anchor. He will plot position. Once he drops anchor then he will take position. He is creating a plan to drop anchor. He has got the anchoring point which was described to investigator.*

Q: So based on what you stated is this a correct method?

A: Yes (Emphasis added.)

[76] Indeed based on what DW6 stated, the parallel indexing method may well have been carried out or conducted correctly. However the incontrovertible fact remains that there is no testimony before the court that the master did in fact execute or perform the various steps outlined above. For example there is no evidence before this court that he took the topographical chart, examined it, picked a point using measurements to keep clear of the 300 metre pipeline distance, used these distances to fix a position, looked at the position and decided that was where he wanted his anchor to be. This is entirely surmise and inference on the part of DW6.

[77] And for example in the course of cross-examination, DW6 testified as follows:

Q: I am looking at this whole thing, my understanding is that when he fixes position using PI, it will fix a position on his vessel but when he drops anchor at that position, I am suggesting to you that without doing an actual plotting exercise he would not know.

A: *He has already pre-planned his position he has picked the position and when he creates that on his radar, remember the anchor is just below the bridge so there is a difference of probably 2 or 3 metres he knows where he precisely dropped his anchor.*

Q: Therefore according to your opinion, using PI, master has to plot position on chart

A: *He would have prepared before that and picked position on chart other way is to start on chart. Look at chart and you say I want to put my anchor there, so you pick that position off and you maneuver to that position. This case Capt has used PI. He used the distance with the PH as distance. He created position first and he anchored on that position. So in his own mind, he has put the anchor clear of the pipeline. He knows exactly where it is as he has created it on his radar.*

Q: I suggest to you that for safe anchoring procedure part in oil field, to comply with 300 feet rule, before dropping anchor should have done plotting to ensure it was dropped outside pipeline area

A: *He did because he has created PI. He has plotted position on the chart. The only way to do that is to pick position of the chart*

Q: Taking position on chart part of planning process

A: Yes

Q: Then he created PI method to go to that position

A: Yes

Q: But at that position which is the position of vessel, my proposition was that he was at that position but he doesn't know what was below the position

A: You misunderstand because of the way he has done the PI he has the precise location of the vessel. He has fixed the position. *He has already done the fixing. Once he reached that point on the radar, he has fixed the position. He knows he is at that position, no pipelines and can drop anchor.*

Q: and that procedure not followed here

A: It was. *As he preplanned the position. He has fixed the position. Gone to the chart taken that position off the chart.*

…

Q: I put to you that this was a very basic and fundamental error committed by the master in navigating the vessel and clearly due to lack of supervision relating to dropping anchor in oil field.

A: Not at all. The procedure used by Capt is a very very good procedure. *The documents show that it was clearly what the Capt did. He did first pick position, verify he was at that location, drop anchor. That is how PI works. Once he gets to the point he wants to get to he was there, he verified position.*

[78] The documents do not clearly show precisely what the master did. Even if they did, such evidence in itself, being disputed as hearsay, would have had limited value. The rest of the cross-examination above makes reference to acts which it is presumed or supposed that the master did or ought to have executed. There is no factual or evidential basis to state that he actually did so. As matters stand therefore there is no factual matrix to support the various statements made by DW6, which must necessarily remain matters of surmise and inference, in the absence of primary evidence.

[79] None of these facts were adduced in evidence through the master. Neither are they agreed facts. It is evident from the foregoing that in tendering his opinion, DW6 relied on the reports of what the master is supposed to have done, premised on the documentary hearsay contained in the defendant's report. Even a perusal of the defendant's report or the Shell report does not detail what the expert did. DW6 did not conduct an interview with the master either. As such his description of the matters above is premised on documentary hearsay, assumptions as well as evidence which is heavily disputed. Therefore the entire thrust of the expert opinion is premised on a factual matrix which has not been proved in court.

[80] Even if DW6 had interviewed the master, this would not have been sufficient basis for him to either testify as a matter of fact as to what the master did, or did not do and how he did it. As matters stand, because the master did not testify, there is no evidence before the court as to precisely what the master did or failed to do on 28 July 2012 immediately prior to dropping anchor. In other words his strategy, planning and execution of events immediately prior to dropping anchor remain unclear. DW6's expert opinion is therefore premised on facts, the veracity of which are in issue, and remain unproved. An expert opinion predicated on facts which have not been proved by way of relevant admissible testimony is unsatisfactory. His conclusions are therefore necessarily of limited value. '… Expert opinion even on admitted or proved facts will differ, and then the court has to decide which opinion it will rely on. But when the facts themselves are not admitted, the court has first to come to a conclusion on the evidence as to what facts have been proved, and then apply to such facts the various expert opinions which have been offered …' (see *Sarkar on Evidence*, (14th Ed), at p 783).

THE PLAINTIFF'S CASE ON CAUSATION

[81] The plaintiff on the other hand, sought to establish causation primarily from the evidence of Captain Tiong, PW1 and Captain Yap, PW2. PW1 was one of the authors of the Shell investigation report as was PW2.

[82] The investigation report comprises an account of the chronology of

events giving rise to the incident, as well as seeking to establish the cause of the incident. The chronology of events leading up to the incident is not essentially in dispute as is borne out by the sequence of events set out above. The precise cause of the incident, namely how or why the anchor was dropped where it was however is very much in dispute. PW1 was a witness of fact and to some extent an expert witness on certain matters. He sought to identify the cause of the incident by reference to an interview he had conducted with the master. This interview formed the basis for his conclusion that the master had failed to plot his location on the relevant topographical chart, prior to dropping anchor. In the course of this interview, PW1 testified that he and the other investigators had observed a demonstration by the master as to the method of parallel indexing he had employed in the course of dropping anchor and concluded that the method so demonstrated was; erroneous or flawed. This fact is disputed by the defendant.

[83] As a matter of evidence, it follows that all matters which PW1 personally investigated in the course of the Shell investigation were within his personal knowledge and he could to that extent advise on the same, for example the fact that he had taken a copy of the relevant topographical chart in the course of investigations. This is direct evidence. However PW1's evidence pertaining to what the master said he did in terms of planning or carrying out the anchor drop is hearsay. It is an account of something that the master told him.

[84] The demonstration that he observed or watched is relevant in so far as his direct observations of that demonstration are concerned. However it is not evidence of the truth of what the master did on 28 July 2004 prior to dropping anchor. It can only comprise evidence of the fact that the master told him these facts, (see *Public Prosecutor v Subramaniam; and R v Woods*).

[85] The fact that the master told him these facts does not comprise evidence of the truth of what actually happened in the period immediately prior to the dropping of anchor, which is relevant to ascertain causation. To this extent therefore, PW1's evidence has to be read carefully to distinguish between those portions that comprise hearsay and direct evidence. In essence, direct evidence of the precise events which gave rise to the master dropping anchor on or near the oil pipe line were not available through the plaintiff's witnesses either. However it served as a prima facie account of the sequence of events both before and after the incident.

[86] In summary, the plaintiff's 'expert' namely PW1, in so far as the methodology to be adopted in dropping anchor was concerned, stated on the basis of an interview and demonstration conducted with the master that he employed parallel indexing but performed the technique incorrectly. This then

is the nub of dispute between the parties. DW6 maintained that the parallel indexing method was carried out correctly, while DW1 maintained that based on the demonstration given by the master the following day, he had performed the technique incorrectly. Additionally PW1 maintained that the master had failed entirely to plot his position, a matter which requires computation and skill.

[87] As a consequence of the incident investigation report, PW1 and Shell concluded that the incident had occurred because of the failure of the master to plot the position of the ship prior to dropping anchor and in failing to carry out the parallel indexing method correctly. Whether this is true, as a matter of fact, is not established, while the fact that such a conclusion was reached by Shell as a consequence of the investigation, is admissible and relevant. It is pertinent that the issues of whether the master did or failed to plot the position of the ship, whether he carried out parallel indexing, and whether, if indeed he carried out parallel indexing he had done so correctly, are matters in dispute.

CAUSATION NOT CONCLUSIVELY ESTABLISHED

[88] It therefore follows that in so far as both experts are concerned, it is not possible to conclude whether the cause of the anchor drop on the oil pipeline was because the master failed to plot his position and performed the parallel indexing method erroneously, or whether it was because the master carried the technique out correctly but made a mistake in the distance he applied when doing the parallel indexing as claimed by the defendant. This is due to a lack of evidence from the master himself as has been explained above. Accordingly the plaintiff's explanation from its experts is also not conclusive, as it too, is premised on a factual matrix which remains unproven.

[89] It is apparent that there is a dispute on a vital fact which could only have been clarified either way by the presence of the master at trial. In his absence the court is left with a lacuna in terms of this factual issue. The evidence before the court is both documentary and oral hearsay which therefore cannot be utilised to establish the truth of the contents of these statements but only goes to show that these statements were made at various times for various purposes to several witnesses in the aftermath of the incident. The court has therefore been deprived of the best evidence available, which, on the facts of this case, were available at the defendant's behest. The defendant maintained at trial that although the master was available, he had not been subpoenaed because he had not been co-operative. This appears to be an insufficient reason to justify his absence, and more significantly, the adducing of direct evidence relevant to the issues here.

A FAILURE TO REBUT INFERENCE OF NEGLIGENCE ESTABLISHED BY THE APPLICATION OF *RES IPSA LOQUITUR*

[90] As stated at the outset of this subsection on causation, the onus lies on the defendant to rebut the inference of negligence arising as a consequence of the application of *res ipsa loquitur* or alternatively the prima facie proof of a breach of a duty of care by the defendant. It does not appear at this stage that the defendant has managed to rebut the inference, given the lack of direct evidence relating to causation, as has been explained exhaustively above. As such the submission by the defendant that the cause of the incident was the master's error when setting up the parallel indexing procedure and not his failure to plot the anchor drop or failure in performing the technique correctly, does not afford a sufficient or plausible explanation in view of the absence of evidence on the crucial issue of what the master did. It therefore follows that the defendant has failed to rebut or discharge the inference of negligence established prima facie by the plaintiff.

ADVERSE INFERENCE UNDER S 114(G) OF THE EVIDENCE ACT 1950

[91] Shell contends that this is a fit case for an adverse inference to be drawn under s 114(g) of the Evidence Act 1950, the inference being that if the master had been called, his evidence on this issue would have been unfavourable to the defendant. *Sarkar on Evidence* (14th Ed), at p 1547) deals with the application of this sub-section thus:

> — Presumption From Not Calling Witnesses Acquainted With Facts and Keeping the Adversary Out of Possession of Evidence
>
> Everything is to be presumed against a party who keeps his adversary out of the possession of evidence by taking means of retaining the evidence in his own custody. A similar presumption may also arise when a party does not call witnesses who are within his reach and are acquainted with the facts of the case… When a party failed to call as his witness the principal person involved and who was in a position to give a first hand account of the matter in controversy and who could have refuted on oath the allegation on the other side, it is legitimate to drawn an adverse inference (*Seth Maganmal v Daibarilal* 47 CLJ 222; 54 MLJ 208 court may draw adverse inference against a party who being in a position to adduce better evidence deliberately abstains from doing so …

[92] This appears to be a fit and proper case for this court to draw an inference under s 114(g) because the master here could have been subpoenaed to give evidence by the defendant. As stated above, the plaintiff has proved a prima facie case whether by the application of *res ipsa loquitur* or by proving the basic elements of negligence. The master's evidence was not essential on these

facts for Shell to establish a prima facie case. As such the onus shifted to the defendant to rebut the inference of negligence that had arisen. The person best placed to explain fully the events of the day would have been the master. Notwithstanding that the master could have been called, the defendant chose not do so, stating that he was unco-operative. Given the singular importance of his evidence and the failure of the defendant to subpoena him, the only conclusion that can reasonably be drawn is that the master's evidence, if produced, would affect the defendant adversely. Such an inference is accordingly drawn, (see also *Subry bin Hamid v Husaini bin Tan Sri Ikhwan & Anor* [2006] 6 MLJ 229).

EVENTS AFTER ANCHOR DROP — ARE THEY RELEVANT TO CAUSATION?

[93] However the issue of causation is not simply restricted to the events that occurred before and soon after anchor drop, but also encompasses the events following upon the heaving up of the anchor. Here the events are not essentially in dispute as is evident from the chronology of salient facts listed at the outset. Initially when the anchor was being retrieved, matters proceeded smoothly until the crew experienced difficulties in heaving the anchor any further. In the absence of the master and the crew at trial, the undisputed version of events put forward was that they thought they had snagged some coral on the sea bed. At that point the master took the decision to exert greater force so as to 'free' the anchor from its entanglement. Matters, it will be recalled, were further compounded by the master then igniting the engine and putting the vessel into a forward thrust mode with a view to freeing the impediment. The only inference that can be drawn is that it failed to occur to the master and any member of the crew that the anchor might have snagged a pipeline. The subsequent force exerted resulted in the rupture of the pipeline and consequent damage to inter alia a riser and other structures. This exemplifies the extent of force used. It was only when bubbles of oil were noticed that the pulling force ceased, by which time the damage had occurred.

[94] It follows from this therefore that it is not simply the events leading up to anchor drop which gave rise to the ruptured pipeline but also the subsequent retrieval, heaving and force used which finally ruptured the pipeline. The dual parts of this incident are, to that extent, indivisible. Even when the anchor had been dropped perilously close to or on to the pipeline, if there had been no subsequent force applied in the retrieval of the anchor, it is plausible that the rupture or the extent of the rupture would have been considerably limited. In other words, without the force used in the subsequent retrieval of the anchor, the incident might have been avoided or its impact considerably reduced. The cause of this incident therefore includes the latter act of having applied force when heaving the anchor which resulted in the rupture. For this latter act, the

explanation put forward by the defendant is that the master and crew failed to recognise the possibility that the anchor had snagged on the pipeline. This is not a plausible excuse or reason, justifying a finding that the inference of negligence has been rebutted.

CONTRIBUTORY CAUSES

(a) Were the topographical charts provided by Shell inadequate, thereby contributing to the incident?

[95] The defendant however further maintains that contributory causes to the occurrence of the incident are the failure on the part of the plaintiff to provide 'chartlets' with safe anchoring zones as specified in the charterer's instructions referred to earlier on. This, it is contended, constitutes a breach by the plaintiff which cannot be excused. The defendant points to the fact that it is possible for Shell to produce charts for anchor drop operations as borne out by specific drawings/maps produced at trial. The defendant further maintains through DW6, its expert, by way of a demonstration in chambers, that the maps provided by Shell were deficient. More particularly DW6 opined that the topographical charts provided were not user-friendly in that these charts increased the chances of error as they did not have compass roses, or an overlaid grid pattern. Moreover he pointed out that the border scale of these charts were not fully graduated and shown in two formats, ie latitude/longitude and northing/easting. These three specific omissions it is contended make it difficult to easily plot positions on the drawing because any distance has to first be converted to metres and then measured from a scale at the base of the chart that is inadequate. Alternatively if a distance is measured on the drawing it has then to be overlaid on the scale. Consequently for any distances greater than the length of these scales, further calculations are needed, example 0.16Nm is greater than the scale. DW6 demonstrated physically the difficulties to be encountered when using the topographical map provided by Shell. In cross-examination he maintained that whilst it is possible to use the topographical chart, its non user friendly traits made an error more likely than if the larger scale British admiralty charts with all its attendant aids had instead been utilised. Accordingly the thrust of the defendant's stance through its expert was that the error made by the master in fixing his distance was attributable in part to the non user friendly characteristics of the topographical chart provided by the defendant.

[96] The plaintiff met these contentions by responding through the testimony of PW1 for example that the topographical charts provided by Shell were more than sufficient, in his view and expertise, for anchor drop positions to be plotted accurately. Shell also contends that the parties have enjoyed a relationship over a period of many years and the topographical charts provided

by Shell have not been a cause of complaint or grievance by the defendant throughout that time until well after this incident. Shell also points to the fact that the defendants were at all times well aware that the topographical chart provided to the vessel did not contain safe anchoring locations but no attempt was made at any time to complain specifically about this lack. Shell further maintained that the chart with anchors that the defendants refer to were produced for a specific project using the mobile rig which required the creation of proposed anchor patterns on the chart. Shell maintains that this particular chart was not a chart showing safe anchoring positions to assist any ship working within the oil field to plot anchoring positions. Shell points to the fact that the topographical chart it provided clearly shows the presence of the three pipelines on the sea bed which is more than sufficient to enable the master to plot his position prior to dropping anchor.

[97] Having considered the competing testimonies of the witnesses at trial, it appears to this court that Shell did in fact produce a topographical chart showing the presence of the oil and gas pipelines clearly. It is in any event an incontrovertible fact that a supply boat navigating in an oilfield is bound to be aware of the existence of oil pipelines when carrying out its duties. It is in fact true that the topographical chart did not contain safe anchoring patterns, as the charterer's instructions indicated they ought to have. However this does not appear to the court to amount to a breach which gave rise to or contributed to the cause of the rupture of the oil pipe because:

(a) there is no evidence before this court that the master found that he was unable to carry out the procedure of plotting a position because of the inadequacy of the topographical charts. That remains a matter of conjecture in the absence of the master;

(b) there is no evidence equally before this court that the master found he was constrained in carrying out the parallel indexing method of determining where to drop anchor by reason of the inadequacy of the topographical charts, again because there was no direct evidence on this issue;

(c) it would appear from the evidence of PW1, which was not rebutted by the defendants' witnesses, that the topographical charts provided by Shell were the same sort of charts routinely provided for several years with no objection or grievance by the defendant as to the lack of delineation of specific anchor drop positions;

(d) the defendants never sought an update of these topographical charts from Shell either during the entirety of their contractual relationship or even immediately after the occurrence of the incident in July 2004; and

(e) such provision of safe anchoring positions has not been recommended by any of the parties even after the incident. It is only the expert for the defendant who has raised this issue as a contributory cause for the

incident. For the reasons above, more particularly the absence of direct testimony from the master it is not possible to determine whether this was a contributory factor. It is not known whether or how the master utilised the topographical chart when deciding where to drop anchor and therefore it follows that any inference to the effect that the lack of these anchoring zones on the chart contributed to the incident would be without evidential basis

(b) The role of the offshore installation manager ('OIM') —contributory cause?

[98] The defendant maintains that a contributory cause of the incident is the offshore installation manager at the Pride Hawaii, who had instructed or told the master to drop anchor on 28 July 2004. In terms of contract the defendant maintains that Shell breached the terms of its contract because the OIM was supposed to communicate with the master to give him precise instructions and warnings of sub-sea obstructions. DW6, the defendant's expert in his report stated that Shell's procedures provided an additional control, namely a close liaison between the responsible rig personnel and the supply vessel. He referred to the fact that the master had 'consistently' stated that someone on the rig told him to anchor on its port side. DW6 maintains that in accordance with the charter's instructions, the person in charge of the rig was required to notify the master of the position of the pipelines. Part 4.3 of the charterer's instructions provides as follows:

> In general vessels are prohibited from entering the 500 metre zone around an installation. Support vessels are allowed to enter but should only do so after consultation with the installation, to ensure that they do not endanger any other operation, which may be carried out …

[99] The expert goes on to point out that the undisputed fact that the master communicated with the OIM as confirmed by the log book of the Pride Hawaii. The precise nature of the conversation is not recorded. DW6 points to the fact that the OIM recorded the anchor position exactly the same as the Master and 0.16NM from the port side of the Pride Hawaii. He states however that the GPS position if plotted on a topographical drawing is not 0.16 NM but instead 0.22NM. This 'non-recognition of the mistake and lack of advice provided to the Master of the presence of sub-sea pipelines illustrates the failure of the rig management and OIM to monitor the anchoring operation' of the vessel. DW6 went on to state in his report that the sub-sea pipelines from SJJT-H which run off the portside of the rig, the Pride Hawaii were an obstruction to the vessel approaching to anchor and moor on this side of the

rig. He faults the OIM, who it is contended, contrary to Shell's guidelines, failed to raise this matter with the master and for not participating in the planned anchor operation.

[100] A perusal of the charterer's instructions discloses that the passage recited above is one in a series of instructions to masters of vessels in relation to their responsibilities. Part 4 No 1 in fact provides that 'Masters of vessels are responsible for the safety of their crews and vessels at all times. They have the authority to decide whether any operation affecting their vessels should proceed or terminate, and should question any instructions from installation or quayside personnel which may create a hazard to their crews or vessels.

[101] It goes on to provide cl 2 that 'OIMs are in charge of their installations and responsible (on behalf of the installation's owner or operator' for the safety of the installation and of those on board.'

[102] It is only in cl 3 that the prohibition of a vessel from entering the 500 metre zone around an installation arises. In this context cl 3 provides that entry into this zone should only be undertaken after consultation with the installation to ensure that they do not endanger any other operations which are being carried out.

[103] It is therefore evident from a perusal of the relevant portion of this section in its entirety that:

(a) the master remains fully responsible for the safety of its vessel at all times to the extent of querying or even refusing to undertake an instruction in the event it places the vessel or crew in danger. In other words, the master is entirely autonomous vis a vis his vessel and crew and must assume sole responsibility for their collective safety;

(b) on the other hand the safety of the installation lies with the OIM;

(c) the two parties must necessarily co-operate when the vessel approaches the 500 metre zone by reason of the sub-sea structures and the rig itself so as to ensure safety. However at no time do the responsibilities of the master and the OIM alter or change, namely to ensure the safety of their vessel and the rig respectively;

(d) it follows therefore that there is no duty on the part of the OIM to assume responsibility for the safe anchoring operations of the master. The mode and timing of undertaking such a venture must lie with the master as the anchor is an integral part of the vessel over which only the master has full and sole control;

(e) such control and responsibility cannot be delegated to the OIM as this

would give rise to the invidious position of the OIM directing the master on precisely where and how to drop anchor; and

(f) this is not the thrust of the charterer's instructions and it is not tenable to read the entirety of section 4 of those instructions in the manner undertaken by DW6, with respect. Accordingly I am unable to accept DW6's construction and creation of a duty of care or contractual duty on the part of the OIM extending to assuming responsibility for anchor operations.

[104] Moreover the evidence from the plaintiff through PW1, which I accept, is relevant and bears out the construction above. It was put to PW1 that the master had dropped the anchor where he did because he was instructed to do so by the Pride Hawaii radio. PW1 however maintained that the master was responsible for the safe navigation of the vessel at all times. He further maintained that the radio operators such as the offshore installation manager were not to instruct the master to drop anchor. In short he was clear that the responsibility of navigating the vessel including the dropping of anchor could not be delegated to operators such as the OIM. PW1 further explained that the radio operator at the rig normally dealt with the coordination of the movement of vessels in and out of the rig. The decision of precisely where to drop the anchor lay with the master.

[105] It therefore follows that the defendant's contention that the OIM by failing to advise the master of the existence of sub-sea pipes and precisely where to drop anchor contributed to the cause of the incident on 28 July 2004 is ill-conceived and therefore rejected.

LIABILITY

[106] Having considered the entirety of the evidence of the several witnesses put forward by Shell and the defendant, the absence of salient and direct evidence, the documentary evidence available, the comprehensive submissions of learned counsel for the defendant and Shell, I conclude that Shell has established on a balance of probabilities that the defendant is entirely liable in negligence for the incident. There is no basis to support a finding of contributory negligence against Shell.

QUANTUM

Issue (d): The construction to be accorded to cl 21 of the conditions of contract, namely whether it limits the defendants' liability to a maximum sum of RM5m or not

[107] The defendant essentially contends that its liability to Shell is in any

event limited to a sum of RM5,000,000 by reason of the existence of a contractual limitation clause in the contract between these parties. The defendant contends that by virtue of cl 21 of the contract dated 14 October 2002 between the parties, there is an agreement that any claim for physical loss to the property of Shell would be subject to a contractual limit of RM5,000,000 (RM5m) only. Shell contends otherwise, namely that no such contractual limit subsists on a true construction of the clause.

[108] Clause 21 provides as follows:

> Clause 21 — Responsibilities and Indemnities
>
> (1) *The Contractor shall be absolutely liable for and shall indemnify the Company,* its Associated Companies, Co-Venturers and Petronas *from and against any and all physical loss of or damage to:*
>
> (a) WORK or any part thereof, howsoever arising, and shall, at its own costs and expense, restore the WORK lost or damaged, replace or repair any unfixed MATERIALS or consumables and the like which have been lost or damaged, remove and dispose of any debris and proceed with the performance of the WORK; and
>
> (b) *Property of the Company,* its Associated Companies, Co-Ventures and Petronas *caused by or contributed to by or resulting from any act, omission, fault, lack of due diligence or negligence of the Contractor,* its Sub-contractors or any of their respective *employees*, servants and agents *unless such loss or damage was caused by the sole negligence of the Company*
>
> *The Contractor's liability under this Clause 21(1)(b) herein shall be limited to Malaysian Ringgit Five Million (RM5,000,000) for any one accident* or series of accidents *arising out of any one event. The liability in excess of such limit shall be governed by applicable law.* (Emphasis added.)

[109] The opposing views expressed on the construction of this clause are as follows. The defendant maintains that the clear and unambiguous construction to be accorded to the limitation of liability expressed in the proviso to cl 21(1)(b), is that the defendant is liable to Shell up to a maximum of RM5m and no more. The plaintiff maintains however, that by reason of the last sentence, the plaintiff is entitled to claim beyond the RM5m limit stipulated earlier. The plaintiff maintains that the limit of RM5m governs liability on a no fault basis whilst the excess is to be determined by proof of fault and is subject to other defences.

[110] Both parties cited several leading authorities on the approach to be taken by a court in interpreting or construing such clauses including *Malaysian Newsprint Industries Sdn Bhd v Perdana Cigna Insurance Bhd & Ors* [2008] 2 MLJ 256, *Asiapools (M) Sdn Bhd v IJM Construction Sdn Bhd* [2010] 3 MLJ 7,

Chamber Colliery Company Ltd v Twyerould [1915] 1 Ch 268, *Interpro Engineering Pte Ltd v Sin Heng Construction Co Pte Ltd* [1998] 1 SLR 694; [1997] 3 SLR (R) 668, *Cornish v Accident Insurance Co Ltd* (1889) 23 QBE 453, *JK Pte LTd v Lonnpac Insurance Bhd* [2011] SGHC 72, *Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd* [1997] 1 MLJ 587 in relation to ambiguities and *Mohammed Shahid Late Mahabubur Rahman v Lim Keenly Builders Pte Ltd (Tokio Marine Insurance Singapore Ltd, third party)* [2010] 3 SLR 1021, *Bekalan Sains P & C Sdn Bhd v Bank Bumiputra Malaysia Bhd* [2011] 5 MLJ 1.

[111] There is no dispute on the law, which is essentially that the court seeks to ascertain what the parties intended at the point of contracting rather than at the point of breach. In seeking to ascertain such intention, the court is to give consideration to the ordinary and contextual meaning of the words, asking itself what the meaning of the words in the contract are, rather than what the parties meant to say. In interpreting the clause the court is bound to give consideration to the entirety of the document read as a whole so as to ascertain the true meaning of the clause. The words of a particular clause are to be read such that the clause fits in harmoniously with the rest of the document, so far as that is possible, without doing violence to the words in their ordinary sense. On occasion this will not be possible, where for example the inconsistency is so great as to warrant the conclusion that the clause or words are repugnant to the document as a whole.

[112] If the words are clear and unambiguous the court is bound to give effect to the words notwithstanding that the result may appear less than reasonable or capricious. The court should ensure that it does not rewrite or remake the contract in any way. Where however the language of the clause or words in question are capable of being construed in two modes, generally that is preferred which will avoid an unreasonable or inconvenient or unjust result.

[113] In interpreting a clause in a contract certain evidence is admissible, primarily to the factual matrix comprising the background of these documents. This is an objective exercise rather than a subjective one. In other words asking the witness post-breach what he meant by the words in a particular clause when entering into a contract is not tenable. The factual background leading up to the making of the contract would be relevant. The meaning of the agreement is to be ascertained from the words of the contract in the context of the circumstances in which the agreement was reached.

[114] In so far as contractual limitations are concerned, the case of *Ailsa Craig Finshing Co Ltd v Malvern Fishing Co LTd & Anor* [1983] 1 All ER 101 is relevant:

> … Whether a condition limiting liability is effective or not is a question of construction of that condition in the context of the contract as a whole. If it is to exclude liability for negligence, it must be most clearly and unambiguously expressed and, in such a contract as this, must be construed contra proferentum. I do not think that there is any doubt so far. But I venture to add one more qualification, or at least clarification. One must not strive to create ambiguities by strained constructions, as I think the appellants have striven to do. The relevant words must be, given, if possible their natural plain meaning. Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion; this is because they must be related to other contractual terms, in particular the risks to which the defending party may be exposed, the remuneration which he receives and possibly also the opportunity of the other party to insure.

(See also *Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd* [2005] 1 MLJ 162)

[115] However it has also been said that there ought to be no rigid distinction between a clause excluding liability and a clause limiting liability. In *BHP Petroleum Ltd v British Steel plc* [2000] 2 Lloyd's Rep 277 Evans LJ stated:

> I think it is unfortunate if the present authorities cannot be reconciled on the basis that no categorisation is necessary and of a general rule that the more extreme the consequences are, in terms of excluding or modifying the liability that would otherwise arise, then the more stringent the courts' approach should be in requiring that the exclusion or limit should be clearly and unambiguously expressed.

[116] It is also clear from a perusal of cl 21(1)(b) that it is not an agreed damages clause but is instead an indemnity afforded by the defendant to the plaintiff in respect of the matters set out therein with a contractual limitation of RM5m for loss of property arising from negligence but with an additional provision that the rest of the liability arising from such negligence is to be ascertained in accordance with 'applicable law'.

[117] The defendant contends that cl 21 has to be construed together with cl 22 to ascertain the true intent of the parties. The stance taken is that from a perusal of these two clauses the full extent of the contractor's liability for damage to Shell's property would be RM5,000,000. It is pointed out that from the evidence of Sidqi Ahmad, DW3 and Thavakumar Kandiahpillai, PW7 who both testified as to the factual background against which this contract was entered into, both parties were looking for certainty in terms of liability. Such certainty it is submitted, was relevant to the issue of pricing, since the contractor's insurance premiums would be built into the costs element which would form part of the tender price. The greater the liability the higher the premium which would in turn translate to a higher tender quotation. To this end, the defendant points out that the contract between the parties provides for a comprehensive clause pertaining to insurance to be taken out by the

defendant as contractor. Clause 22, it is pointed out, requires the defendant to take out comprehensive general liability insurance covering the contractor's liabilities in the amount of RM5,000,000 for any one accident or series of accidents arising from any one event. The entirety of cl 22 which I do not produce here is relevant and ought to be read, as should cl 20. The defendant attacks Shell's stance that RM5m is the minimum liability which the defendant has to pay without the need for Shell to prove anything, while monies in excess of such limit are payable in accordance with normal standards of proof and defences as being entirely untenable. The defendant submits that this construction has been put forward by Shell in an attempt to make sense of the proviso The liability in excess of such limit shall be governed by applicable law'. PW7 went so far as to state that it was not necessary for Shell to establish any fault or omission on the part of the defendant to enable it to claim the sum of up to RM5m. He likened it to an on demand guarantee. This the defendant maintained made no sense. They further submitted that an examination of the words utilised in cl 21 namely 'caused by or contributed to by or resulting from any act, omission, fault, lack of due diligence or negligence of the Contractor' refer to elements of fault for which proof is necessary as a consequence of which the construction adopted by Shell is not sustainable.

[118] Conversely they argue that in order to make any sense at all and to accord some degree of certainty to the parties vis a vis liability and sufficiency of insurance coverage it was the intention of the parties that the full extent of the contractor's liability for damage to Shell's property would be RM5m and no more. The defendant points to the fact that Shell requires the contractor to take out comprehensive general insurance policy for exactly that sum. There is no specification to the effect that RM5m is the minimum amount.

[119] The defendant deals with the proviso to cl 21(1)(b) thus:

(a) does the applicable law allow someone to claim in excess of the agreed limit, ie does the Malaysian High Court uphold a contractual limitation of liability clause?;

(b) if it does, then there would be no right to claim beyond that contractual limit; and

(c) if on the other hand the Malaysian High Court states that the applicable law does not recognise a contractual limit, then Shell may claim in full.

[120] This it is contended is the only reasonable construction to be taken from the plain and obvious language given the factual matrix and background to the contract. Further as the Malaysian courts do uphold contractual limitation clauses it is submitted that it is clear that the defendant's liability is limited to RM5m.

[121] The defendant also submits that cl 21 as drafted by Shell is ambiguous and contradictory. Given such ambiguity the application of the contra proferentum rule provides that it must be construed against the proffers. Therefore they contend that cl 21 should be construed against Shell as it is ambiguous, (see *Malaysian National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29; [1978] 1 LNS 117).

[122] Shell, on the other hand maintains that there is no ambiguity in cl 21. The language it is pointed out is plain and clear. It is submitted for Shell that on a perusal of cl 21 the following interpretation becomes obvious:

(a) the defendants shall be absolutely liable for any physical loss or damage;

(b) this absolute liability is predicated on the premise that the defendant caused or contributed to the loss or damage;

(c) the defendants can only be exonerated if the loss or damage was caused by the sole negligence of Shell; and

(d) there is a limit of liability of RM5m on the part of the defendant for any of these losses caused or contributed by them and any loss in excess of the RM5m shall be governed by applicable law.

[123] As such it is contended this means that:

(a) the defendant as the contract is absolutely liable for any loss or damage to shell's property caused or contributed to by the defendant's negligence. This absolute liability shall be borne by the defendants even if it is not the sole cause;

(b) the defendant is exonerated only if the incident was caused by the sole negligence of Shell;

(c) the defendant's absolute liability has a minimum limit of RM5m and any loss in excess of that shall be governed by applicable law;

(d) the intention as reflected in this clause is to create a scheme of liability where losses up to a limit of RM5m should fall on the defendants. That is the reason for fixing the basic minimum limit of RM5m even if the defendants did not solely cause the loss;

(e) this is made absolutely clear by the final sentence that 'the liability in excess of such limit shall be governed by applicable law'. The words such limit is a reference back to the limit of RM5m in the preceding sentence. Therefore it is argued that such limit can only be interpreted to mean minimum limit and not maximum limit as contended by the defendant; and

(f) any other interpretation it is contended would render the final sentence

meaningless. As the words are clear the court should strive to give it a reasonable meaning so as to reflect the objective intention of the parties.

[124] Further Shell submits that even if it is considered that there is an ambiguity in the clause a study of the factual matrix resolves the same. In this context Shell points to the evidence of PW7 who having dealt with various contracting parties over the years fully understands the rationale of the various terms. His evidence was that this clause reflected a commercial arrangement by which the contractors agreed to bear the minimum liability of RM5m with any excess to be determined by law. This would allow the contract to be certain as to its minimum liability and make insurance arrangements accordingly.

[125] I have perused, considered and studied the competing submissions of learned counsel for Shell and the defendant at some length. I have also perused and considered the relevant clauses in the contract between the parties, the evidence of DW3 and PW7, but only in so far as the factual background pertaining to the contract is concerned. I have disregarded any subjective views or opinions as to what the parties now say they meant then in relation to the relevant cl 21 and the contract as a whole. Having done so the following interpretation appears to this court to best reflect objectively the intention of the parties:

(a) as stated at the outset, cl 21, entitled 'Responsibilities and Indemnities' provides for the defendant contractor to be 'absolutely liable for' and to be bound to 'indemnify', inter alia, Shell from and against any and all physical loss or damage to Shell's property which was:

(i) caused by;

(ii) contributed to by; or

(iii) resulting from

any act, or omission or fault or lack of due diligence or negligence of the defendant or its employees, unless the damage was caused wholly or solely by Shell.

[126] The final limb of cl 21 then provides that the defendant's liability for physical loss or damage to Shell's property as specified is to be limited to RM5m for any one accident or series of accidents arising out of any one event. The liability in excess of the said limit of RM5m for any one accident or series of accidents arising out of one event is to be determined by applicable law, namely Malaysian law.

[127] It therefore follows firstly that in accordance with the first part of cl 21, the defendant has contracted to accept or undertake the whole or entire liability for all physical loss and damage suffered by Shell if the defendant

caused or contributed to or any act on its part resulted in the damage so suffered by Shell. In other words, vide the first part of this clause the defendant assumes or undertakes the entire responsibility and liability for physical loss and damage whether it caused all such damage or merely contributed to the same or even perhaps carried out or omitted some act which resulted in such damage. Even if the defendant is only contributorily negligent and the damage really resulted from the actual fault or omission of a third party or the environment for example, the defendant has agreed to undertake the full liability for such damage. This is borne out by the use of the word 'indemnify' which means to make good all losses suffered. The thrust of this clause is the assumption of full liability even where there is no full liability or fault. The only instance in which the defendant is exonerated is if the loss was caused entirely by Shell. So if Shell was contributorily negligent the defendant would still remain wholly or entirely liable for such damage.

[128] It is evident that this is therefore an onerous assumption of risk.

[129] In mitigation of such onerous risk therefore the last limb of cl 21 goes on to provide that such liability as has been assumed by the defendant is limited to RM5m. Therefore for all damage up to a limit of RM5m, no matter that the defendant was not solely responsible for the same, it remains liable for the entire sum. Notwithstanding the contributory negligence of other parties or even that a greater degree of fault may be attributable to some third party for such damage, the defendant agrees to indemnify Shell against the same, thereby avoiding the necessity of Shell having to prosecute or bring proceedings for recovery of such monies against other parties.

[130] Beyond the sum of RM5m however the defendant does not undertake or assume any such entire liability for physical loss and damage suffered by Shell. Beyond RM5m, the liability of the defendant, if at all, is to be determined in accordance with standards, of proof and subject to relevant damages and proof of damages as required by the law in Malaysia.

[131] It is therefore inaccurate to conclude that up to a limit of RM5m there is no necessity to prove the quantum of damage suffered as was contended. Indeed there is a necessity to prove all damage suffered, albeit applying common law principles in tort or s 75 of the Contracts Act 1950 in contract. However having proved the loss and damage suffered, the defendant undertakes or assumes full liability or responsibility up to the sum of RM5m only, after which liability is allocated in accordance with the apportioned degree of liability as determined by law.

[132] Such a construction, it appears to this court comprises a reasonable and objective interpretation which accords well with the other clauses and the

rest of the contract between the parties. It is also completely consonant with cl 22 of the contract which provides for the contractor to procure insurance to the extent of RM5m prior to entry into the contract. This then ensures that the initial liability imposed upon and accepted by the contractor/defendant is assured and certain. As cl 22(c) allows for the contractor to procure all other insurance such as P&I coverage, all other liability, if at all, may then be procured from other sources as may become necessary after adjudication and apportionment of liability.

[133] In summary therefore I am satisfied that cl 21(1) in its entirety does not provide simply a contractual limitation as is submitted by the defendant but instead is an indemnity clause providing for cover in two tranches as it were, the first tranche being the sum of RM5m which is payable by the contractor notwithstanding that fault or liability is not attributed entirely to it, so long as the incident in question was not caused by the sole negligence of Shell. The second tranche only arises provided there is liability which has been determined and adjudicated upon in accordance with the law. All damages claimed however have to be proved.

[134] Therefore there is no contractual limitation of RM5m in respect of all physical loss suffered, as alleged by the defendant.

Issue (e): Whether the defendants are entitled to the benefit of tonnage limitation under the Merchant Shipping Ordinance 1952

[135] As I have rejected the contention that Shell's claim is limited to RM5m, it is now necessary for this court to ascertain and consider whether the defendant is entitled to a limitation of liability under s 360 of the Merchant Shipping Ordinance 1952.

[136] Section 360 provides as follows:

> 360 Limitation of owner's liability in certain cases of loss of life, injury or damage
>
> (1) The owner of a Malaysian or foreign ship shall not, where all or any of the following occurrences take place without his actual fault or privity, namely;
>
> (a) where any loss of life or personal injury is caused to any person being earned in the ship;
>
> (b) where any damage or loss is caused in any goods, merchandise or, other things whatsoever on board the ship;
>
> (c) where any loss of life or personal injury is caused to any person not carried in the ship through the act of any person, whether on board the ship or not, in the navigation or management of the ship, or in

loading, carriage or discharge of her cargo, or in the embarkation, carriage or disembarkation of her passenger, or through any other act of any person on board the ship, be liable to damages beyond the following amounts:

(aa) in respect of loss of life or personal injury, either alone or together with such loss, damage or infringement as is mentioned in paragraphs (b) and (d), an aggregate amount not exceeding an amount equivalent to three thousand one hundred gold francs for each ton of the ship's tonnage; and

(bb) in respect of such loss, damage or infringement as is mentioned in paragraphs (b) and (d), whether there is in addition loss of life or personal injury or not, an aggregate amount not exceeding an amount equivalent to one thousand gold francs for each ton of the ship's tonnage.

[137] In order to enjoy the benefit of the tonnage limitation granted under the provisions of the Merchant Shipping Ordinance 1952 in respect of the physical damage occasioned as a consequence of the anchor snagging on the oil pipeline, the shipowner needs to establish that the incident occurred without the shipowner's 'actual fault or privity'. The burden lies on the defendant to establish that the incident occurred without it's actual fault or privity, (see *Antara Koh Pte Ltd v Eng Tou Offshore Pte Ltd* [2005] 4 SLR 521).

[138] Actual fault and privity refers to some form of fault or blameworthy conduct which was personal to the owners of the ship or to which they consented or of which they had knowledge, (see *Admiralty Law and Practice*, (2nd Ed), Toh Kian Sing, SC at p 4540). Such fault and privity has to be distinguished from constructive fault or privity of the shipowner's servants or agents for which he is not precluded from making claim for limitation, notwithstanding that he is vicariously responsible for the acts of his agents and servants. However it was equally held in *Lennard Carrying Company Ltd v Asiatic Petroleum Co Ltd* [1914–1915] All ER Rep 280 by Viscount Haldane that:

> … It is not enough that the fault should be the fault of a servant in order to exonerate the shipowner, that the fault must also be one which is not the fault of the owner, or a fault to which the owner is privy …

[139] Lord Denning MR in *The Eurysthenes* [1976] 2 Lloyd's Rep 171 conducted a comprehensive historical survey of the origin of the word 'privity' and concluded that it referred to both actual and constructive (turning a blind eye) knowledge. I highlight the essence of the test enunciated and since followed, as set out by learned counsel for the defendant:

A … Hence in the later Merchant Shipping Acts the owner was entitled to limit his liability if the act was done without his 'actual fault or privity'. Without his 'actual fault' meant without any actual fault by the owner personally. Without his 'privity' meant without his knowledge or concurrence …

B …

To disentitle the shipowner, he must, I think have knowledge not only of the facts constituting the unseaworthiness but also knowledge that those facts rendered the ship unseaworthy, that is, not reasonably fit to encounter the ordinary perils of the sea. And when I speak of knowledge, I mean not only positive knowledge but also the sort of knowledge expressed in the phrase 'turning a blind eye'. If a man, C suspicious of the truth, turns a blind eye to it, and refrains from inquiry — so that he should not know it for certain then he is to be regarded as knowing the truth. This 'turning a blind eye' is far more blameworthy than mere negligence. Negligence in not knowing the truth is not equivalent to knowledge of it.

D The knowledge must also be the knowledge of the shipowner personally, or his alter ego, or in the case of a company, its head men or whoever may be considered either alter ego. It may be inferred from evidence that a reasonably prudent owner in his place would have known the facts and have realised that the ship was not reasonably fit to be sent to sea. But, if the shipowner satisfies the court that he did not know the facts or did not realise that they rendered the ship unseaworthy, then he ought not E to be held privy to it even though he was negligent in not knowing.

[140] In *The Star Sea* [2001] 1 Lloyd's Rep 389 the English House of Lords in approving the decision of Lord Denning in *The Eurysthenes* went on to hold, F inter alia:

… A finding of negligence to a very high degree did not suffice for a finding of privity.

G **[141]** Lord Justice Scott concluded as follows:

… In summary, blind-eye knowledge requires in my opinion, a suspicion that the relevant facts do exist and a deliberate to avoid confirming that they exist.

In my opinion, in order for there to be blind-eye knowledge, the suspicion must be H firmly grounded and targeted on specific facts. The deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe. To allow blind-eye knowledge to be constituted by a decision not to enquire into a untargeted or speculative suspicion would be to allow negligence, albeit gross, to be the basis of a finding of privity.

I

[142] In *The Sunrise Crane* [2004] 4 SLR 715 Justice Judith Prakash in the Singapore Court of Appeal affirmed the principle that 'he (owner) has the onus of proving that the loss or damage caused by the negligent navigation and management of the ship took place without his actual fault and privity.'

[143] Learned counsel for the plaintiff points out that in that case the Singapore Court of Appeal opined that the courts generally do not favour allowing owners to limit liability except in the clearest of cases. It was pointed out that over the years the courts have whittled down the protection available to ship owners from the 1957 Convention which is incorporated in s 360 of the Merchant Shipping Ordinance:

> … Although it would appear from the above explanation of the meaning of actual fault and privity that it would not be very difficult for the ship owner to show that any particular negligent act in the management or navigation of his vessel occurred without his actual fault or privity, the courts do not favour limitation and, as the cases developed over the years, the opposite proved to be the case. A survey of the cases on the issue cited by the appellant itself shows that the threshold to cross before a defendant can avail himself of the limitation defence is very high.

[144] While on the one hand the definition and approach to be adopted in determining whether any particular incident can be said to be incurred without the actual fault and privity of the shipowner is stated to be objective and relatively difficult to break in principle, a survey of the case law reveals however, that the threshold to be scaled by a shipowner to obtain limitation is not low.

[145] While many of the cases deal with cases where the seaworthiness of a vessel is in issue in relation to its physical fitness to encounter the ordinary perils of the sea, there is a further dimension to this notion which is relevant in this case. Of equal importance is the safety management and operation of a vessel. A ship which is not safely managed or operated can be as unsafe and as dangerous as one which is not physically fit. If there are insufficient procedures or unsafe procedures adopted in the course of management or navigation of a ship, that may well be sufficient to deprive the shipowner of the benefit of limitation.

[146] In *The Marion* [1984] AC 563 and Lord Brandon repeated what he had stated in *The Lady Gwendolen* [1965] 2 All ER 283:

> … it seems to me that any company which embarks on the business of ship owning must accept the obligation to ensure efficient management of its ships if it is to enjoy the very considerable benefits conferred by the statutory right to limitation.

[147] The introduction of the international management code for the safe operation of ships ('ISM code') set an international standard for the safe management and operation of ships. It sets out the factors to be borne in mind when a company considers its 'safety management objectives'. Its basic aim is to instil in shipowners a sense of safety consciousness and to promote a safety culture in the management and operation of their ships. It is this system which comes under test when an incident such as the present occurs. In this case the

defendant has systematically adopted the tenets of the ISM Code in its company procedures and regulations vide its safety management system. The existence of this system in the instant case shows that the defendant has in place a comprehensive regulatory regime. What is of relevance here is whether there was compliance with the same. To ensure to some extent that its objectives are achieved the defendant here has complied with and received the necessary certification to show that a safe system of management has been set up and that it is in operation on board the ship.

[148] It must be pointed out that even if the documentary demands of the SMS or ISM have been complied with in that the vessel has been issued with the requisite certificates, certification alone is not in itself proof that the ship is in actual fact safely managed and operated. This remains a question of fact which is to be determined by the court. The existence of all relevant certification does not absolve or usurp the court's role in investigating and determining for itself whether in fact the vessel is safely managed and operated.

[149] In *The Star Sea* [1995] 1 Lloyd's Rep 65 the ship in question had been issued with a cargo ship safety certificate covering, inter alia, fire safety. Tuckey J stated that 'no owner does or should rely on this as a substitute for his own responsibility for the safety of his ship.'

[150] And in *The Toledo* [1995] 1 Lloyd's Rep 40 Mr Justice Clarke placed emphasis on the standards of a 'reasonable shipowner'. He said 'The reasonable shipowner would have appreciated the risk and would have set up a proper system for the inspection, ascertainment and repair' of the frames and brackets supporting the shell plating in the holds. In essence therefore a ship which is not safely managed or operated can be as unsafe and as dangerous as one which is not physically fit. If therefore there is a lack of a particular procedure or a particular procedure is unsafe, the ship cannot be said to be compliant with its own regulatory code of safe management and would thus be disentitled to the benefit of limitation cover.

[151] Given the parameters of 'actual fault and privity' it now falls to be considered who is deemed to be the ship owner for the purposes of according or depriving the defendant of its right to limitation under s 360.

WHOSE ACTS ARE ATTRIBUTABLE TO THE DEFENDANT SHIP OWNER?

[152] Where, as in the instant case, the shipowner is a company, the issue of whose act is to be regarded the act of the company becomes crucial. In other words, in whom, in the ranks of the Defendant company must the necessary privity reside. In *Meridian Global Funds Management Asia Ltd v Securities*

Commission [1995] 3 All ER 918 the various principles of the law of attribution were canvassed. Although not an insurance case, the points of law raised are relevant to this subject. Lord Hoffman framed the issue thus:

> Whose act (or knowledge, or state of mind) for this purpose intended to count as the act etc of the company?' Here the phrase 'for this purpose' necessarily refers to the purpose of breaking limitation under the MSO. The approach taken by the English Court of Appeal in *The Eurysthenes* (above) and *The Star Sea* (above) is in tune with the rules of attribution advocated by Lord Hoffman in the Meridian case. In The Eurysthenes, Lord Denning stated: 'The knowledge must also be the knowledge of the shipowner personally, or of his later ego, or in the case of a company, of its head men or whoever may be considered their ego.

[153] The fact that a company is an 'abstraction' with no mind of its own any more than it has a body of its own makes it more difficult to apply the substantive law. A company has to conduct itself through various persons and therefore the matter turns on which person (or persons) is 'the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.'

[154] The law is clear however that neither the employment of a competent master nor a manager will divest a shipowner of certain aspects of its responsibility. In the limitation case of *Lennard Carrying Company Ltd v Asiatic Petroleum Company Ltd* the House of Lords applied the following test: 'Who in the company was responsible for monitoring the condition of the ship, receiving the reports of the master and the ship's agents, authorising repairs efc? That person was the directing mind and will of the company and therefore his act is attributable to the company. The case law discloses that if the directing mind and will of the company is not to be found on the board of directors or a member of the same it is usually found in the body of a high ranking officer of the company holding a managerial position. However a mere employee or servant and even the DPA could not reasonably be said to comprise the directing mind and will of the shipowner. Important decisions relating to management are rarely left to junior or less than high ranking individuals within the corporation.

[155] It is pertinent that in this context the plaintiff submits that DW1, the designated person ashore or DPA is a relevant person for the purposes of attributing actual fault and privity. It appears to this court however that the actions of the DPA do not on the facts of this case affect the right of the shipowner because his position within the corporate structure is not high enough to constitute its alter ego. The primary function of the DPA is to relay relevant information from ship to shore and vice versa. Notwithstanding this the ultimate responsibility of ensuring that information is indeed efficiently and regularly transmitted remains with the company. To enjoy limitation and

absolve itself of fault and privity, the company has to be kept advised of any breakdown in its system of monitoring or communication. A breakdown or failure to monitor could amount to constructive knowledge of the fault in the management of the ship.

(See also *Antara Koh Pte Ltd v Eng Tou Offshore Pte Ltd* [2005] 4 SLR 521 and the very useful guidance in *HL Bolton (Engineering) Company Ltd v VTJ Graham & Sons Ltd* [1957] 1 QB 159 where Denning LJ famously drew an analogy between a company and human anatomy:

> … A company in many ways may be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with the directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in the cases where the law requires personal fault as a condition of a liability in tort, the fault of the manager will be the personal fault of the company.

[156] He went on to state:

> So here the intention of the company can be derived from the intention of its officers and agents. Whether their intention is the company's intention depends on the nature of the matter under consideration, the relative position of the officer or agent and the other relevant facts and circumstances of the case …

[157] The plaintiff here maintains that premised on the factual matrix of this case the management of the defendant was headed by DW3, including the DPA, DW1 who together it is submitted comprise the mind and will of the defendant. They include DW1 because they point out that DW3 has no navigational experience. Notwithstanding that he is the executive director having overall charge of the management and operation of the defendant, it is the DPA or DW1 who had the specific function within the management of implementing the ISM. This included ensuring that the specific system of management was maintained and observed including the requisite audits pertaining to the SMS. The DPA, it is maintained is responsible for exercising proper supervision over the Master to ensure compliance. In essence they submit that DW3, as executive director and DW1, as the DPA, who reported directly to DW3, comprise the mind and will of the company. The onus they maintain therefore is on the defendant to establish that the incident occurred without the fault and privity of DW1 and DW3.

[158] The defendant on the other hand contends that what is critical is the identity of the person to whom responsibility of operational matters is

entrusted, (see *The Ert Stefanie* [1989] 1 Lloyd's Rep 349). Referring to the company organisational structure the defendant contends that the directing mind and will of the company for the present purposes is Captain Henry Tukang, DW5, who was the fleet manager and to whom DW3, the executive director had delegated the day to day operational responsibility. DW5 is moreover a master mariner who had been at sea for many years.

[159] Having considered the competing submissions of learned counsel, as well as the relevant evidence, submissions and case law above it appears to this court that the persons in the instant case who represent the directing mind and will of the company are DW3 and DW5 or either one of them. This arises from the fact that DW3 is the managing director of the company and is therefore readily identifiable as one of the persons representing the directing mind and will of the company. As he had delegated the significant responsibility of day to day operational matters, which would include navigational matters to DW5, who also occupies a relatively high ranking managerial position, DW5 can also be described as a person to whom the mind and will of the company may be attributed. I am unable to conclude, as pointed out earlier that DW1 comprised part of the controlling mind and will of the ship owner. Although he was tasked with the implementation of the ISM and reported directly to DW3, his acts in isolation cannot reasonably be attributed to the company because he is not sufficiently senior. He is a mere employee. Any lack in the system in terms of monitoring or supervising navigational requirements must therefore have been with the knowledge and concurrence of DW3 and/or DW5 or both in order for the defendant to be deprived of the benefit of tonnage limitation.

ACTUAL FAULT AND PRIVITY

[160] Both learned counsel have dealt comprehensively with the extensive case law on this subject which I do not intend to reproduce here. In relation to the need and standard of care imposed on ship owners to ensure proper and adequate supervision in the navigation of the vessel the Singapore decision of *The Sunrise Crane* is instructive. In *The England* [1973] 1 Lloyd's Rep 373, Sir Gordon Willmer stated:

> … The decision of the House of Lords in the case of the *Norman* [1960] 1 Lloyd's Rep 1 seems to me to have thrown quite a fresh light on the extent of managerial duties of owners and managers, especially in relation to the supply of navigational information and publications to their vessels. It seems to me that it is no longer permissible for owners or managers to wash their hands so completely of all questions of navigation, or to leave everything to the unassisted discretion of their masters.

[161] In *The Sunrise Crane*, notwithstanding that the defendant there had employed a qualified master and crew and had a safety management system

that complied with international standards which had been certified by the government the court concluded nonetheless that the shipowner was not absolved from its duty to ensure that there was a proper system on board the vessel for dealing with cargo (as the issue here was the handling of dangerous cargo which subsequently exploded). The court noted that there was in particular no evidence pertaining to the existence of a proper system in relation to the transfer of cargo between vessels or between vessels and the shore installation. Similarly in *Antara Koh Pte Ltd v Eng Tou Offshore Pte Ltd* [2005] 4 SLR 521 the crane mounted on the crane barge Antara Koh 88 collapsed while lifting a handling boat which sank as a result. Belinda Ang J refused limitation finding that the owner of the crane barge failed to establish that the accident occurred without its actual fault or privity. On the evidence it was found that the owner had delegated the duty of maintaining the crane to a plant manager. However no checks or supervision were carried out on the plant manager pertaining to the management of the crane. This finding was made notwithstanding the owners' evidence that it did conduct occasional spot checks and read operational reports. There were however no systematic supervisory measures.

[162] In the United Kingdom the leading case of *The Lady Gwendolen* [1965] 3 WLR 91 dealt with what amounted to the master's negligence. He was traversing at excessive speed in foggy conditions resulting in the vessel colliding into another vessel which was stationary and lying at anchor. The Lady Gwendolen admitted liability and instituted an action seeking a decree of limitation. It was held that the owner failed to prove that the incident occurred without its actual fault and privity. This was by reason of the failure of the owner to give instructions to the master as to the use or misuse of the radar and to draw the master's attention to a government notice relating to navigation with radar in reduced visibility. This was a case where the master was plainly negligent in traversing at excessive speed in reduced visibility. He was in sole control of the vessel. Notwithstanding this the owner was not exonerated. The case established the principle that it is important that masters not be left unsupervised and that where there are specific acts of the master which could cause concern, the system of management in place must have the ability to first detect that defect and to then take such steps so as to control and discourage that defective practice. In this context the defendant contends that the defendant unlike the ship owner in The Lady Gwendolen did have a proper structure in place under its ISM which was approved by the Flag State as well as Lloyds. They also point to the fact that there was no evidence of previous conduct by the master which could have alerted it that he was dropping anchor within the prohibited vicinity of 300ft from the pipeline. The plaintiff on the other hand, relying on the same authority contends that neither DW3 through DW1 nor DW5 put in place any system of ascertaining or checking where or how the master dropped anchor and whether he did so within the prohibited zone of 300ft from oil pipelines.

[163] *The Marion* [1984] 2 Lloyd's Rep 1 is a case involving an anchor fouling a pipeline as is the case here. In that case the master used an out of date chart, dropped his anchor onto a pipeline which he would have known about had he used the up to date chart. The owners had left it to the master to update the charts and they failed to have any system in place to supervise the master as to whether he had in fact updated the charts. Other ship owners at the time also left it to their masters to update their charts. This case established that the principle that all ship owning companies had to accept the obligation to ensure efficient management of their ships if they were to enjoy the very considerable benefits conferred by the statutory right to limitation. The case is of primary relevance here as the issue before this court is whether the defendant in the instant case had in place sufficient procedures in place to ascertain safe anchoring procedures albeit in the form of the defendant's safety management system and by way of audits to ensure that masters complied with and practiced safe anchoring techniques such as plotting positions or carrying out parallel indexing accurately.

[164] The defendant points to the case of *The Chugaway II* 1969 2 Lloyd's Rep 526 in support of their contention that they are entitled to limit liability. In that case the plaintiff's tug Chugaway II was towing an empty barge up the Fraser River in British Columbia. The height of the barge from top to water was 26ft. A chart showed the clearance of the Fraser Street Bridge to be 24ft above high water. On passing under the bridge, the barge struck the bridge injuring those on the bridge and further caused damage to the bridge itself. Limitation of liability was disputed on the grounds that the ship owner had failed to instruct the master to use a chart when going under the bridge and/or that it had failed to instruct the master not to tow the barge under the bridge and had failed to instruct the master to use an alternative channel. It was in evidence that it was common practice to calculate actual clearances at the bridge by counting visible planks at the previous bridge by allowing one foot for each plank and adding 19ft. In these circumstances the learned judge allowed a limitation of liability. He found that the accident was entirely due to the master failing to count accurately the number of planks or failing to remember the actual count. The failure was not, it was found, in any sense due to the method employed by the master for deciding the clearance of the bridge. The choice of channel moreover was held to be a matter of navigation within the discretion of the master.

[165] In like manner the defendant maintains that this case is on all fours with the present factual matrix because the 'error' of the master in computing the distance in calculating or determining where to drop the anchor arose not because of the use of an erroneous method but was an error which was entirely within the master's own discretion. That error was the miscalculation of the distances to be applied in utilising the correct parallel indexing method.

[166] In the instant case as has been examined exhaustively, this court has been unable to arrive at the precise cause of the incident, save for the general finding that it arose as a consequence of navigational error on the part of the master both in determining where to drop his anchor in the vicinity of pipelines in an oilfield as well as the protocol, or the lack of protocol exhibited in retrieving the starboard anchor when an obstruction arose.

[167] In view of the master's absence the court has not been able to assess the precise cause or reason for the anchor drop on or too near the pipeline. An adverse inference was drawn earlier under s 114(g) to the effect that if he had been called as a witness and had testified his, evidence would have been detrimental to the defendant. His evidence is again directly relevant and significant in relation to tonnage limitation. It is the master who would have been able to testify factually on the issue of whether or not there was any or sufficient supervision exercised over him in respect of his navigational skills in general. Additionally he would have been in a position to testify as to the sufficiency of the procedures in the SMS manual utilised by the defendant at the time, training in respect of stop work procedures, plotting positions on maps and parallel indexing as well. In his absence the court is deprived of the ability to assess whether the master was adequately supervised or checked to ascertain that he was following acceptable procedures and levels of safety in these areas. Equally the court is unable to determine definitively that the master committed an error which is entirely attributable to him and not to the defendant. As such the court is constrained to also draw an inference in relation to tonnage limitation that the failure to produce the master, which the defendant was in a position to do, warrants the implication of an adverse inference that if he had been called, his evidence would have been adverse to the defendant in terms of its safety management system, more particularly the implementation of the same on an operational basis.

[168] As matters stand the issue of tonnage limitation was dealt with in evidence on behalf of the defendant, who bears the burden, by DW5 and DW3. A consideration of their evidence is relevant for the purposes of ascertaining whether the defendant has established that it is entitled to the benefit of limitation in that the incident occurred without the actual fault and privity of either of these individuals who represent the directing mind and will of the defendant.

[169] DW5, Captain Henry Tukang was at the time of the incident, the fleet manager. He explained that overall responsibility rested with DW3, while he was in charge of the 'operation side of things'. He had three personnel reporting directly to him, namely an HSE manager, a senior operations manager and an operations manager. The DPA who was also the ISM manager was separate from operations but also reported to DW5 on matters pertaining to operations.

DW5 also sought, as did DW3 to place considerable weight on the fact that Shell itself imposed strict standards of safety which the defendant had to comply with, and did so comply at the time.

[170] DW5 emphasised that the incident was the primary fault of the master, as far as he was concerned. He classified it as an error of the master which he assumed arose from the use of the parallel indexing system, notwithstanding that there was no independent evidence of the same before the court. To that extent his evidence was not of consequence. However he emphasised that the vessel itself was seaworthy in that it had been properly classed and all statutory certificates were in place, as was the equipment. It must be emphasised again, as I have said above, that the presence of valid certification both for the vessel and the master, while comprising acceptable standards of compliance with international safety codes in themselves cannot be a substitute for the safe management of the vessel, particularly in relation to navigational matters. In other words, it is insufficient to simply rely on the certificates to exhibit and prove sufficient compliance. An absence of certification will certainly tend to show a greater possibility and degree of failure to comply with requisite standards thereby facilitating a finding that limitation ought not to be accorded. However the converse does not automatically apply.

[171] DW5 explained in examination-in-chief that the supervision of the master and crew of the vessel comprised briefings for them on operations matters prior to their boarding the vessels. All elements outlined in the SMS manual and charterers' instructions and HSE policies of Shell comprised part of the briefing according to him. The master would undergo an ISM briefing by the DPA. Thereafter the operations manager would do appraisals of the master and if there were problems these would be highlighted to the management. DW5 testified that there were no problems with Captain Tom Muar, the master here. However DW5's evidence on these matters was general in nature, and not specifically with reference to the master in the instant case. DW5 also pointed to its ISM and Shell's HSE MS Audit to prove that the defendant had implemented properly and fully these codes for safe management practice.

[172] In the course of cross-examination, DW5 was asked whether there was any safe anchoring procedure within pipelines contained in the defendant's safety manual prior to the incident. He replied that the type of operations undertaken by the Borcos Takdir, did not include anchoring within the pipeline zone. Masters he added were competent to know how to drop anchor as they practiced and learnt this in school. He accepted that after the incident the defendant had added an anchoring procedure to its safety management system in view of the incident. Although the Borcos Takdir as a supply vessel

was not supposed to drop anchor according to DW5, he was aware that the master had dropped anchor twice. This he maintained was because Shell told him to do so. However he also agreed that the vessel remained under the command of the master and was managed by the defendant. He also agreed that safe navigation of the vessel could not be contracted to Shell, thereby accepting that the responsibility for safe navigation lay with the defendant.

[173] This aspect is highlighted because the defendant submits that Shell imposes a strict HSE policy which has to be met by the defendant in order to procure and maintain its contracts. In short it is submitted that the fact that the defendant passed and met Shell's stringent standards meant that the defendant had in effect a sound management system in terms of safety and management of the operations of the vessel. It appears to this court that notwithstanding the high and stringent standards imposed by Shell or any other contractor, the safety of the navigational and operational matters pertaining to the vessel must lie primarily with the ship owner. As accepted by DW5 this cannot be delegated to the contracting party, such as Shell. It is the defendant that seeks the benefit of limitation and under the statute the burden clearly lies on the defendant to establish that the incident occurred without the actual knowledge and concurrence of the ship owner. That cannot be delegated to Shell.

[174] DW5 accepted therefore that pre-2004, there were no specific anchor drop provisions in the defendant's SMS manual. The Masters were sufficiently competent, it was maintained, to know when where and how to drop anchor. However this was altered post-incident in November 2004 when a section on anchor drop procedures was included.

[175] DW5 also accepted in the course of cross-examination that prior to July 2004 there were no safety procedure briefings and no safety meetings conducted by the defendant in relation to safe anchoring procedures within the pipeline corridors in oilfields. He also accepted that post-incident in 2004 the set of guidelines or directions included in the defendant's SMS included the methodology of plotting on a chart as part of the anchoring procedure. There was no recommendation in the SMS for parallel indexing to be utilised, although it specifies that the masters may plot their positions with the use of radar or GPS.

[176] DW5 did not accept that the defendant ought to have implemented a safe anchoring procedure in its SMS prior to July 2004 maintaining that it was left to the master and his expertise to do that. DW5 also agreed that it was critical that a master had to understand that he had to plot a position prior to dropping anchor specifically in an oil field area.

[177] It was put to him that prior to July 2004, the defendant did not have

a system that ensured that the master conducted safe operations including safe anchor operations within the pipeline area. He disagreed maintaining that the inclusions to the SMS manual post incident in November 2004 were merely to enhance operational procedures. In other words he maintained that there was no defect or flaw in relation to anchor dropping operational issues in the SMS at the time of the incident.

[178] When he was cross-examined on Captain Tom Muar's performance, DW5 maintained that the operations manager had reported that the master performed very well. He was unaware that a warning letter had been issued to Captain Tom Muar.

[179] DW5 also agreed that after the incident steps taken to preclude a recurrence of the incident included a review of the SMS to include safe anchoring procedure in the vicinity of a pipeline. It was put to him that the defendant did not have a safe system of operating within an oilfield at the time of the incident. The defendant was also aware from the records of the vessel that it had anchored near the Pride Hawaii on a previous occasion.

[180] With regards to the topographical charts supplied by Shell, DW5 testified that there had been no complaints from Captain Tom Muar or any other masters about these charts. It was put to DW5 that the master failed to use the topographical chart to plot his position because there was no such guidance or direction in the defendant's safety manual system at the time. Pursuant to the investigation conducted by the defendant, DW5 also stated that based on their findings the defendant did not see any position fixing on the BA charts which were, the charts supplied by the defendant. Based on the defendant's investigation findings it was also put to DW5 that the dropping of the anchor near the pipeline occurred because there was no system or practice in the defendant's safety management system which inculcated into the master the practice of plotting positions prior to dropping anchor. It was also put to DW5 that there was no supervision or briefing as to the steps or procedure to be followed when it was found that they had snagged an obstruction. In other words they were not briefed on a stop work procedure. It was suggested that the defendant's safety management system did not brief or educate its masters and crew on the practice of dealing with potential hazards. DW5 disagreed maintaining that there were briefings and a stop work policy existed. However neither the master nor the crew were available in court to confirm that such procedures were practiced routinely and that such briefings were conducted. DW5 also accepted that a very specific procedure on heaving of the anchor was introduced into the safety management manual after the incident. DW5 maintained that the inclusion was designed to improve procedures. It was also suggested to DW5 that the inculcation of safety management principles was lacking in the master and crew of the Borcos Takdir, to which suggestion he

disagreed. In essence the thrust of the cross-examination was that safe anchor practices were not specified in the SMS prior to the incident in July 2004 and no supervision of safe anchoring practices was conducted to ensure that masters regularly complied with the need to adopt standard practices of safety prior to dropping anchor. The evidence produced by the defendant, who bears the burden of proving no actual fault and privity was general in nature. The absence of the master did not assist as there was no tangible evidence before the court that:

(a) the defendant routinely emphasised or briefed the master of the vessel of the importance of safe anchoring procedures in oil pipeline areas more particularly the significance of plotting or carrying out parallel indexing accurately in order to avoid accidents;

(b) no safe anchoring procedure particularly within oilfields with pipelines existed in the defendant's safety management system notwithstanding that the Borcos Takdir was a supply vessel that did on occasion drop anchor in the vicinity of such pipelines;

(c) briefings were conducted from time to time to ensure that masters and crew adopted safe anchoring procedures;

(d) no operational audits were conducted to ascertain whether the master or the crew, albeit properly qualified, routinely and regularly undertook and practiced safe anchoring procedures including plotting or carrying out parallel indexing correctly prior to anchor drops in the vicinity of oil pipelines;

(e) there was no stop work procedure set out in the defendant's safety management manual in the face of potential hazards; and

(f) there was no evidence of briefing by the defendant as to the necessary steps to be undertaken in the event of an obstruction being encountered during the retrieval of the anchor.

[181] DW3, the executive director is not a mariner and delegated the operational matters primarily to DW5. He emphasised that Captain Tom Muar was an experienced master whom, moreover, Shell had accepted as being fit and competent. He also maintained that the defendant had implemented an ISM code which was approved by the authorities. Shell in turn had conducted HSE audits which acknowledged he maintained that the ISM was adequately implemented. He testified that while the defendant encouraged continual enhancement of training it was ridiculous to suggest that Captain Tom Muar needed to be taught basic chart work. In essence he understood from his managers that the system implemented by the defendant was more than sufficient to meet ISM standards.

[182] In the course of cross-examination he opined that the procedure that the master failed to follow was the stop work policy. He was unable to comment on whether the defendant had an adequate safe anchoring procedure specified in its manual prior to the incident primarily because he was not conversant with navigational matters not being a mariner. It was put to him that the defendant's safety management system was flawed because there were no safe anchoring procedures utilised by the master specified, to which he did not agree.

[183] He was also not able to comment on the suggestion that no operational audits were conducted prior to the incidents in relation to whether safety procedures for anchoring were carried out. However after the incident DW3 agreed to send all masters for further training in an attempt to prevent recurrence of the incident.

[184] DW3 was also questioned on what the master reportedly did as may be gleaned from the domestic inquiry held after the incident. He testified that it appeared that while the master did not plot his position he carried out parallel indexing. This however is not admissible being hearsay. Neither is it of particular relevance in relation to limitation. DW3 however disagreed that the anchor snagging the pipeline was not solely the responsibility of the master but indicated a flaw in the management system in the first place.

[185] More particularly he disagreed that the incident arose as a consequence of the failure of the DPA to verify that the ISM was complied with including safe anchoring procedures, such as they were. He also disagreed that the defendant failed to detect unsafe practices because the defendant did not conduct sufficient audit or briefings on safe practices. However a marine superintendant was appointed after the incident to assist with marine training and auditing.

[186] It was also suggested that one fleet manager for the thirty vessels that comprised the defendant's fleet was insufficient to ensure that there were proper operational audits conducted, more particularly on the Borcos Takdir. After the incident additional site visit inspections were undertaken as one of the recommendations to prevent recurrence.

[187] I have considered and read the evidence of DW3 and DW5 as well as DW1 who reported directly to DW3. I have also considered the submissions of learned counsel for the plaintiff and the defendant in relation to tonnage limitation which was comprehensive and extensive. Having considered the same I conclude that:

(a) while the defendant maintained some general procedures by way of a

check list on anchor dropping operations, there was no comprehensive guide on the procedure to be adopted in dropping anchor stipulated in the defendant's SMS prior to the incident in July 2004, particularly in relation to operations in oilfields in the vicinity of oil pipelines;

(b) there was no emphasis on the importance of plotting positions adopted by the defendant prior to the incident so as to inculcate safe anchoring procedures particularly in the vicinity of pipelines in oilfields;

(c) there was no supervision of the navigational skills or practices of the master of the Borcos Takdir to ensure that he was complying with and practicing safe anchoring procedures prior to anchor drop in the vicinity of oil filed and pipelines notwithstanding that the Borcos Takdir was contracted primarily as a supply vessel for this purpose;

(d) there was no evidence of briefings or audit checks so undertaken specifically in relation to this operational issue. The general audit checks appear to be focussed towards compliance on paper rather than in the spirit and minds of the personnel, prior to July 2004;

(e) there was no evidence of audits or supervision of the navigational procedures such as parallel indexing for the purposes of anchor drop ascertained or determined by the defendant from time to time to ensure safe anchoring procedures in the vicinity of oil pipelines;

(f) there was insufficient express stipulation or specification of a stop work policy upon the vessel coming across an obstruction within the vicinity of oil pipes and an oil rig; and

(g) there was insufficient or no briefing on the dangers of forcing or applying forward thrust when snagging of an underwater obstruction was encountered in the vicinity of an oil field.

[188] The failure to ensure the existence and implementation of these various safeguards can be attributed to the directing mind and will of the company in this case, DW5, the fleet manager. It was incumbent upon DW5 as the primary person having charge of all operational matters of the defendant to ensure that there were sufficient safeguards in place to preclude the rupture of an oil pipe by a supply vessel delivering necessary supplies to an oil rig. On the facts of this case, particularly in the absence of the master who would have been the primary witness of significance, it is not possible to conclude that the defendant has discharged its burden of establishing that the incident occurred without its fault or privity through the person of DW5. DW3 is less relevant as matters now stand because he was not a master mariner and has little knowledge of navigational matters. This responsibility for navigational and operational matters was left in the hands of DW5 on behalf of the company. The introduction of comprehensive anchoring procedures in the vicinity of an oil pipeline as well as stop work procedures upon encountering an obstruction

were only introduced into the SMS after the incident. As I have stated earlier there is no evidence of the existence of a regular or routine audit on the operational and navigational aspects of dropping anchor. The introduction of the position of a marine superintendant after the incident bears out the importance of implementing regular audits to ensure that masters such as Captain Tom Muar on the Borcos Takdir practiced safe anchor dropping techniques in the vicinity of oil pipelines. This did not exist prior to the incident. Such audits and briefings should have been carried out but were neither a part of the SMS nor were practiced as borne out by the evidence. In these circumstances I am unable to conclude that the defendant has discharged the burden of establishing that the incident occurred without its actual fault and privity. In so concluding I am cognisant of the fact that I am not to view events on hindsight and apply standards of near perfection (see *The Owner or other Person Interested in the Ship or Vessel 'the Red Gold' v Sarawak Shell Sdn Bhd and another appeal* [2012] 4 MLJ 729. The rupture of an oil pipe by a supply vessel in the vicinity of an oil field is or ought to be a readily recognisable risk to any contractor undertaking the supply of deliverables on a routine basis. It is equally clear that there ought to be in place a stringent set of standards and audits to prevent an incident such as the rupture of an oil pipe as it causes considerable damage, physical, environmental and economic. The fact that Shell practices and requires a high standard of safety is no substitute for the defendant implementing and practising a sufficiently safe system of vessel operation and management. Ultimately the management of the vessel cannot be delegated to Shell. On the evidence it appears to this court that this is a case where the defendant simply shut their eyes to the obvious risk of a casualty arising from a defective anchor operation in the vicinity of an oil pipeline.

[189] Neither can the defendant wash its hands of its need to ensure navigational safety by attributing the entire incident in the instant case to one of a mistake or error wholly attributable to the master. The lack of anchoring procedures as well as the lack of a stop work procedure comprise an integral and indivisible part of the cause of the incident. In these circumstances I am constrained to conclude that the defendant is not entitled to tonnage limitation. I concur with learned counsel for the plaintiff that anchor operations in an oil field attract a myriad of potential hazards. It is important for a ship owner to put in place stringent and detailed work practices and procedures, and further to ensure that such practice and procedures are strictly complied with to avoid potential and dangerous hazards such as rupturing oil pipes.

Issue (f): Whether Shell mitigated or failed to mitigate the loss suffered

Quantum of damages claimed

[190] Shell led evidence to the effect that it is entitled to the sum of

RM34,548,477.64 and USD4,860,440.71. Several witnesses, namely PW4, PW5 and PW6 gave evidence on the quantum of damages incurred and the strategy and implementation of repair to the damaged pipeline and other structures. The scope of work for the repair of the 6 inch pipeline and riser and SJJT-H structural member and riser clamps is detailed in a document prepared by Shell. PW6, Sim Theng Kiok the head of offshore construction services explained in some length and detail precisely how the aforesaid sum was incurred. The repair works were undertaken by a contractor by the name of TL offshore ('TLO') after a stringent tendering process, supervised and approved by both Shell and Petronas, was undertaken. Sim explained that the repair work on the damaged pipeline involved a wide array of costs. As such Shell had to engage TLO in substantial negotiations on the costs to be charged for various items of work. Sim negotiated these rates. It would appear from a reading of both parties' evidence that in so far as rates are concerned, Shell made the requisite efforts to ensure that costs were kept reasonable. The specific details of the costs of work carried out is; set out in Sim's evidence with the invoices and the breakdown. In summary Shell expended:

(a) RM1,920,000 for the transportation of the replacement pipe including miscellaneous fabrication;

(b) RM2,966,220 and USD1,851,909 for the mobilisation of a barge to carry out the work. This is separated into RM and USD because part of the costs were incurred in USD for the charter of the barge from an international owner or operator. Two sets of invoices were incurred for mobilisation and two sets of, invoices for demobilisation. This arose as will be discussed below because of the priority accorded to another project which meant that the repair of the SJJT pipeline was delayed until close to the monsoon season. Work had to cease during the monsoon and rather than incur wasted daily rates for the barge and workmen, the barge was demobilised until after the monsoon, resulting in two sets of invoices;

(c) RM239,535.24 for the payment of the purchase of swivels and flanges essential for the installation of the replacement pipe particularly at the connection points;

(d) RM803,824.98 and USD818,039.58 being the monies paid for work done in respect of the installation and laying of 400 metres of the 6 inch pipeline. This reflects the damaged section. Again the invoices are in RM and USD. While the pipeline was being laid, the barge still had to be on site and remain mobilised therefore resulting in running costs of mobilisation;

(e) RM513,902.80 and USD522,970.55 being the costs for the replacement and installation of the braces at the jacket and the riser, which comprise

a part of the platform structure. This was necessary because as a result of the force exerted by the anchor dragging the riser was ripped from its connection points with the braces;

(f) RM22,058576.00 which was for the remaining work done when the project resumed after the monsoon. Remobilisation was necessary. Costs were agreed on a lumpsum;

(g) RM1,280,000 was for work expended in respect of structural scope relating to transportation of 400 metres of 6 inch pipelines with fabrication and procurement;

(h) RM1,479,851.74 and USD1,667,521.58 for weather downtime costs when work stopped due to bad weather;

(i) RM3,183,426.38 to a contractor called SARKU for underwater structural and pipeline damage inspection and survey. They had been contracted to Shell to perform this type of work and. for the purposes of this particular incident entered into Contract No 590803. They issued a report for the work carried out between 31 July 2004 and 1 September 2004 to determine the scope of work that was necessary for the repair. There are a whole series of invoices in relation to the underwater inspection and maintenance services carried out evidencing the quantum paid out by Shell; and

(j) RM103,140.50 being payment to another contractor called Velosi for the provision of labour, supervision, materials, consumables, equipment, tools vehicles and services.

[191] Therefore the total sum expended by Shell was RM34,548,477.64 and USD4,860,440.71. Payment certificates evidencing the payment out of this total sum of monies was adduced in evidence.

MITIGATION

[192] The defendant contends that Shell failed to act reasonably so as to mitigate the losses it suffered and that accordingly its claim should be limited to the sum of RM26,000,000.

[193] Shell in response contends that the defendant failed to plead mitigation and should therefore be precluded from raising this issue altogether. Shell relies on *Geest plc v Lansiquot* [2002] 1 WLR 3111 where Lord Bingham delivering the judgment of the Privy Council stated:

> … It should however be clearly understood that if a defendant intends to contend that a plaintiff had failed to act reasonably to mitigate his or her damage, notice of such contention should be clearly given to the plaintiff long enough before the hearing to enable the plaintiff to prepare to meet it. If there are no pleadings, notice should be given by letter.

[194] In *Geest*'s case the plaintiff fell and injured her back in the course of her employment. She sought damages for personal injuries. Damages were subsequently assessed. Having been advised of her medical options, the plaintiff decided not to undergo surgery. The defendant adduced no evidence but in submissions maintained that by declining to undergo an operation, the plaintiff had failed to mitigate the damage she had suffered from her injury. The judge agreed with this submission on the basis that the burden was on the plaintiff, such that she had to prove that her failure to undergo the operation was reasonable. He limited her damages accordingly. The Eastern Caribbean Court of Appeal accepted that the burden lay on the plaintiff to prove that her conduct was reasonable but reversed the judge's decision and increased the award. The defendant appealed to the judicial committee who held, dismissing the appeal, that where a plaintiff had refused medical treatment the burden lay on the defendant to prove that the refusal was unreasonable and thus constituted a failure by the plaintiff to mitigate the damage sustained. In this case the evidence showed that there was no or limited evidence to suggest that the plaintiff's decision not to undergo surgery was unreasonable and therefore the defendant had failed to show that the plaintiff had failed to mitigate her loss. It was in this context therefore that the remarks above were made. In other words, if the defendant proposes to contend that there was a failure to act reasonably to mitigate his loss then notice of such contention ought to be accorded to the plaintiff so that the plaintiff might prepare to meet this contention.

[195] In the instant case while the defendant might not have expressly pleaded mitigation in its defence there was more than sufficient notice given well prior to trial to the effect that it would be taking up the issue that Shell had failed to reasonably limit its losses. The evidence of DW4, Abraham Klok, was received in evidence by the plaintiff with no objection. There is clear evidence before this court adduced at trial without objection to seek to establish this contention. Shell in fact rebutted the contention in the form of PW5. As such there is evidence before this court from the defendant in support of its contention that Shell failed to mitigate its losses reasonably, in the form of the evidence of DW4. Accordingly it does not appear to this court that Shell is in any way prejudiced by the defendant raising this issue of a failure to reasonably mitigate. Unlike *Geest*'s case, the plaintiff was appraised of the fact, and took no objection to the defendant challenging the evidence DW4.

[196] In any event in *Joo Leong Timber v Dr Jaswant Singh Jagat Singh* [2003] 5 MLJ 116; [2003] 5 CLJ 287 Jeffrey Tan J (now FCJ) held that in Malaysia in the absence of a corresponding rule in the Rules of the High Court 1980, there is no legal authority which states that the failure to mitigate damages must be pleaded. As far as is known, there is no such rule that the failure to mitigate damages must be pleaded. Seeking to adduce evidence to that effect may well

require that relevant facts pertaining to this issue are before the court but that is certainly not the case here. Here the defendant's witness, DW4 on the basis of the evidence tendered by Shell, offered his opinion as to whether the repair had been done as expeditiously and as cheaply as was reasonably possible given the entirety of the circumstances. No independent evidence which Shell had to separately rebut was given by the defendant. In these circumstances the defendant cannot be faulted for not pleading specifically that Shell had failed to reasonably mitigate its loss. The defendant is entitled to raise the issue of mitigation without any specific plea.

[197] The principle in relation to the mitigation of damages has been set out in the Federal Court case of *Kebatasan Timber Extraction Co v Chong Fah Shing* [1969] 2 MLJ 6:

> The law however imposes a duty on every person who sufferes damages on account of breach of contract to take reasonable steps to mitigate the damage. In *Anson's Principles of the English Law of Contract*, (22nd Ed), at p 504, the following passage appears:
>
> > It also follows from the rule that damages are compensatory only that one who has suffered a loss from a breach of contract must take any reasonable steps that are available to him to mitigate the extent of the damage caused by the breach. He cannot claim to be compensated by the party in default for loss which is really due not to the breach but to his own failure to behave reasonably after the breach.
> >
> > Thus although the measure of damages for breach of a contract to deliver goods is ordinarily the difference between the contract price of the goods and the market price at the time when delivery should have been given, yet if the plaintiff might have mitigated his loss, for example, by any immediate purchase at a low price of goods to replace those not delivered, or by accepting a reasonable offer from the defendant to make good part of the loss, hit is to be taken into account in assessing his damages (*Brace v Calder*, *Payzu Ltd v Saunders*. It is a question of fact in each case whether he has acted as a reasonable man might have been expected to act, and he is not required to risk his commercial reputation (Finlay (Fames) & Co Ltd NV Kwik Hoo Tong HM) or to embark upon complicated litigation (*Pilkington v Wood*) in order to mitigate his loss.

[198] And in *Bekalan Sains P & C v Bank Bumiputra Malaysia Bhd* [2011] 5 MLJ 1 at pp 58–59 the Court of Appeal held:

> … The appellant is duty bound to take all reasonable steps to mitigate the loss suffered consequent upon the respondent bank's purported breach of contract. Yet the appellant did not do so … Pearson LJ in *Darbishire v Warran* [1963] 1 WLR 1067 (CA) expressed the meaning behind the phrase 'duty to mitigate the loss' in these erudite terms (see p 1075):

> … It is important to appreciate the true nature of the so-called 'duty to mitigate the loss' or duty to minimise the damage'. The plaintiff is not under any actual obligation to adopt the cheaper method: If he wishes to adopt the more expensive method, he is at liberty to do so and by doing so he commits no wrong against the defendant or anyone else. The true meaning is that the plaintiff is not entitled to charge the defendant by way of damages with any greater sum than that which he reasonably needs to expend for the purpose of making good the loss. In short, he is fully entitled to be as extravagant as he pleases but not at the expense of the defendant.

[199] Shell submits that the principles to be applied by this court in determining whether it mitigated its loss or not are contained in the Singapore decision of *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR 288. It submits that the burden of establishing that Shell failed to mitigate its loss lies with the defendant.

[200] The approach to be taken is:

> The burden of proving the actual amount of damage nevertheless remains with the claimant In assessing the reasonableness of the claimant's conduct, the court will take cognisance of the fact that the claimant is 'not bound to nurse the interest of the party in breach' per Roskill LJ in *Harlow & Jones v Panex (International) Ltd* [1967] 2 Lloyd's Rep 509 at p 530) but, at the same time, cannot disregard the defaulting party's interests. Reasonableness in this context often means tempering self-interest with reference to the knowledge that another party may have to foot the invoices. If the claimant utilises an unreasonably priced or an exorbitant means of rectifying the breach, this cannot be visited upon the party in breach.
>
> In my judgment, given the urgency of the situation, it was reasonable for the defendant to have proceeded to engage Y & Q and capital builders and to utilise some of its workers as well. Mitigation is neither an exact science nor a mathematical exercise. It must be viewed through a commercial lens and measured by commercial common sense. The court will not audit every decision made in the turmoil of a difficult and fluid commercial situation. In *China Resources Purchasing Co Ltd v Yue Ziu Enterprises (S) Pte Ltd* [1996] 1 SLR (R) 397 at [24] Karthigesu JA opined that when a duty mitigate arises, then the standard of reasonableness to be applied to the decision of the innocent party is not a high one. I should add that the issue of whether the claimant has acted reasonably is clearly a matter of fact and not law.

[201] The evidence at trial disclosed that Shell had, at the time of the proposed repair of the damaged pipeline and other structural damage, two competing projects which needed attention. One was the present case, while the other was called the Baram 8 project. I adopt the summary of the evidence pertaining to this issue as contained in learned counsel for the plaintiff's submissions below:

(a) PW4 explained the competing interests that Shell had to bear. He

testified that the damage to the underwater pipeline occurred at the end of July going into the beginning of August 2004. Substantial planning for repairs was required and it would have taken at least a month or more before work could commence. At the same time Shell also had to deal with the Baram 8 project which involved the decommissioning of an offshore structure;

(b) PW4 explained that Shell's priority at all times is safety which is of paramount importance;

(c) the only contractor available was one TL Offshore (TLO) and there were insufficient resources for both the Baram 8 as well as the pipeline repair project to proceed concurrently. Having given this issue considerable consideration, Shell decided to proceed with the Baram 8 project first. Prior to this decision being taken, the matter was referred to the decision review Board of Shell, which is the organisation's highest authority. The essential reason why the Baram 8 project was accorded priority was the issue of safety as it involved working in murky and swirling waters which would pose a considerable hazard during the monsoon season;

(d) accordingly the decommissioning of the offshore structure for the Baram 8 project commenced first. Upon completion the pipe repair project commenced but the monsoon period had begun. During that period, the work barge had to lay idle as did the workmen who had been hired to enable the bad weather to blow over. This would have escalated costs substantially. As a consequence, Shell decided to demobilise and resume work only after the monsoon. Shell's witnesses testified that this measure was both cost saving and also ensured that safety was a priority.

[202] PW6 also explained in the course of his evidence that under Shell's petroleum sharing contract with Petronas, it was committed to remove the structure by a specified dateline. Shell had a contractual and commercial obligation to remove the Baram 8 platform, not to mention its reputation.

[203] He further elaborated that one of the reasons for Shell's decision to stop work during the monsoon period was because Shell was already mobilising a barge in 2005 for another project. They could then take advantage of that hiring to use the barge for the repair works as well, so as to save costs.

[204] The defendant however submits to the contrary that the plaintiff's ought to have accepted an offer of repair by one Global Offshore to do the works for a sum of USD6.84m (or RM26m) outside of the monsoon period. The contractor, Global Offshore made an offer as of 30 September 2004 to carry out the pipeline repair work for the said sum provided however that work started on or by 15 October 2011 so as to avoid the monsoon period. The defendant points to the fact that Shell, having the option to proceed with the

Baram project or the pipe repair for SJJT prior to the monsoon elected to complete the former, which it is contended was unreasonable in the circumstances.

[205] The Baram 8 project involved the cutting down and sinking of a 30 year old disused platform to form an artificial reef. Learned counsel for the defendant points to the fact that PW5 conceded that there was no evidence of any commercial or governmental pressure driving Shell to complete this project by 2004. He however stated that the management of Shell had taken a decision to do it by 2004. It appears that Shell had committed to move the structure by 2004 for environmental reasons and this commitment had been given to the government.

[206] Learned counsel for the defendant further points to the fact that the decision to proceed with the Baram 8 project was a decision of choice rather than need. The decision was made by the review board after reviewing weather patterns. They took the view that the weather was trending favourably and asked TLO to proceed with the subject repair works in December 2004. That assessment was erroneous and as a consequence work could not proceed during the unfavourable monsoon period resulting in substantial weather downtime. The defendant therefore submits that the decision to proceed in the monsoon season was as a matter of fact, unreasonable. After the first mobilisation was aborted, Shell engaged TLO to proceed with the work in February 2005 still during the monsoon season which again resulted in substantial down time for weather which was built into their lump sum quotation. The defendant also submits that it was not as if it was urgently necessary for them to proceed during the monsoon season. As such the defendant maintains that the action of Shell in proceeding during the monsoon season to effect repairs not only once but twice meant that the repair costs which it estimates to have been in the region of USD6.8m or RM26m, ballooned to over RM56m. The defendant bases this sum of USD6.84m on the offer made by the other contractor, Global Offshore, which offer it will be recalled was conditional upon work starting by 15 October 2011.

[207] In summary therefore the defendant contends that Shell failed to mitigate its losses by according priority to the Baram 8 project which in turn led to a delay in the commencement of repair work on SJJT-H. Such delay meant that Shell decided to commence work very close to the monsoon period. During this season, work could not proceed due to bad weather conditions resulting in mobilisation and demobilisation costs being incurred not once but twice. Additionally considerable 'downtime' was incurred. It is on this premise that the defendant seeks to have Shell's claim reduced to RM26m.

[208] Shell in response sought to defend its decision as being entirely

reasonable in the circumstances. It pointed out that serious consideration was given to deciding on which project to proceed with, and that it was not an arbitrary decision to proceed with the Baram 8 project. Learned counsel for Shell points to the fact that Shell had to consider its contractual and commercial implications of declining to complete the Baram 8 project despite its earlier commitment to the government and Petronas to have the disused platform cleared by 2004. Given the limited resources available to them they accorded priority to the Baram 8 project. Shell also explained that Global Offshore Malaysia's offer appeared cheaper there were many qualifications to it including the weather. Additionally PW6 testified that Global Offshore would utilise the same barge that TLO subsequently utilised for this repair work. He maintained that the quote from Global was not commercially viable.

[209] Shell explains its decision to stop work in the midst of the monsoon weather because the idling costs would have been prohibitive. They also pointed to the fact that the repair works would be tagged on to their 2005 projects which would save costs.

[210] The defendant called an expert to comment with Shell's damages claim. He produced a detailed report where he confirmed the scope of the repair works as being correct. With respect to the execution of the work he stated that it was carried out during the monsoon season with weather standby included in the lump sum price paid to the contractor. He concluded that delays in the work were mainly caused by the weather standbys because of the monsoon period.

[211] DW4 also criticised the amount of time it took from August to 22 October to get an agreement in place with TLO for these repairs. He highlighted the existence of the Global Offshore offer to carry out the works for a lump sum of RM26m which offer could have been accepted instead of pursuing the TLO contract. This delay he pointed out resulted in the execution of the work taking place during the monsoon season. This decision to proceed during the monsoon season was questionable. In the course of cross-examination he stated as follows:

> … So if you start later in monsoon, you have a chance of good weather if you are lucky and bad weather if unlucky. If you want to base your project on that, either the project had to be deferred after the monsoon, so you can't have both the cake and eat it as well. So barge already mobilised at such a late day so you go beyond 31.10. So both activities will take 14 days so certainly either of the project will enter into monsoon season. So if there is a safety concern. Can't because of limitation of weather. You have to defer one of them and install after the monsoon, that would be the compromise. So it is up to Shell.

[212] In essence the dispute on mitigation turns on whether Shell failed to

act reasonably in electing to proceed with the Baram 8 project rather than proceeding with the repair of the SJT-H pipeline damage. If Shell can be stated to have acted unreasonably in making that decision it then follows that it has failed to fully mitigate its loss and should not therefore be entitled to the full sum claimed. If however Shell can be said to have acted reasonably in mitigation by deciding as it did, then it is entitled to the full sum claimed. In neither instance however is it tenable to consider the option of simply adopting the contract price offered by Global Offshore of USD6.84m or RM26m as the quantum of damages recoverable. This is because that sum is merely an estimated sum made by way of a first offer to effect the repair of the damaged pipeline with specific conditions and qualifications relating to timelines as well the weather. That offer or sum of RM26m does not and cannot therefore reflect the loss and damage suffered by Shell. It is not a 'real' figure. It is a preliminary estimate which is shorn of any factual basis in the context of actual physical loss and damage suffered. If therefore the defendant's contention that Shell acted unreasonably in mitigating its damages is to be accepted the net effect would be to effect a percentage deduction in the quantum claimed by Shell, rather than an adoption of the figure of RM26m which, in the present circumstances is a somewhat arbitrary estimate. The defendant has not put forward an alternative figure premised on the actual loss suffered by Shell.

[213] Turning however to the primary issue of whether or not Shell acted reasonably it appears to this court that:

(a) Shell had no option but to accord priority to one of the two competing projects;

(b) it is difficult for this court to conclude, in hindsight, that Shell acted unreasonably in according priority to the Baram 8 project. Shell is entitled to weigh up and balance its competing interests and obligations and determine reasonably which project was to be given priority. Consideration was accorded to the subject at several levels and there appears to be sufficient factual basis to warrant Shell determining the matter as it did. I am guided by the key principle of reasonableness and the fact that it is not necessary for Shell to 'nurse the interests' of the defendant while it cannot of course act arbitrarily, without care for mounting costs and losses which are to be borne by the defaulting party;

(c) there is no real dispute that the sums claimed by Shell were in fact accrued and paid out by it. In this respect I am satisfied that Shell was at pains to procure and negotiate reasonable contracts and rates;

(d) there was however considerable increase in costs as a result of the weather 'downtime' and mobilisation and demobilisation costs incurred as a consequence of the weather during the monsoon;

(e) given the entirety of the circumstances I find that Shell did not act

unreasonably in proceeding as it did in according priority to the Baram project. The timing of the repairs for the incident coincided with a prior obligation undertaken by Shell and to which it was committed. Therefore Shell was entitled to determine that the need to effect repairs was to be accorded less priority than its prior obligations;

(f) notwithstanding my finding above, it appears to this court that it does not automatically follow that Shell is entitled to the entire amount claimed. Given the entirety of the circumstances it appears that a portion of the losses sustained more particularly pertaining to the costs of downtime and the additional mobilisation and demobilisation costs ought to be shared or absorbed by Shell. I come to this conclusion because having considered the issue of the time lapse between the incident and the commencement of repairs, as well as the decision to continue work during the monsoon, it appears to this court that:

(i) 30% of the costs of mobilisation and demobilisation of RM2,966,220 and USD1,851,909; and

(ii) 30% of the weather downtime costs of RM1,479,851.74 and USD1,667,521.58

ought to be absorbed or borne by Shell. This amounts to a deduction of RM889,866 and USD555,573 for mobilisation and demobilisation costs and a deduction of RM443,955 and USD500,256 for weather downtime costs. These sums are to be deducted from Shell's total claim of RM34,548,477.64 and USD4,860,440.71.

[214] Accordingly Shell is entitled to judgment in the sum of RM33,214,656.64 and USD3,804,611.71 together with interest and costs.

Plaintiffs' claim for sum of RM33,214,656.64 and USD3,804,611.71 together with interest and costs allowed.

Reported by Kohila Nesan